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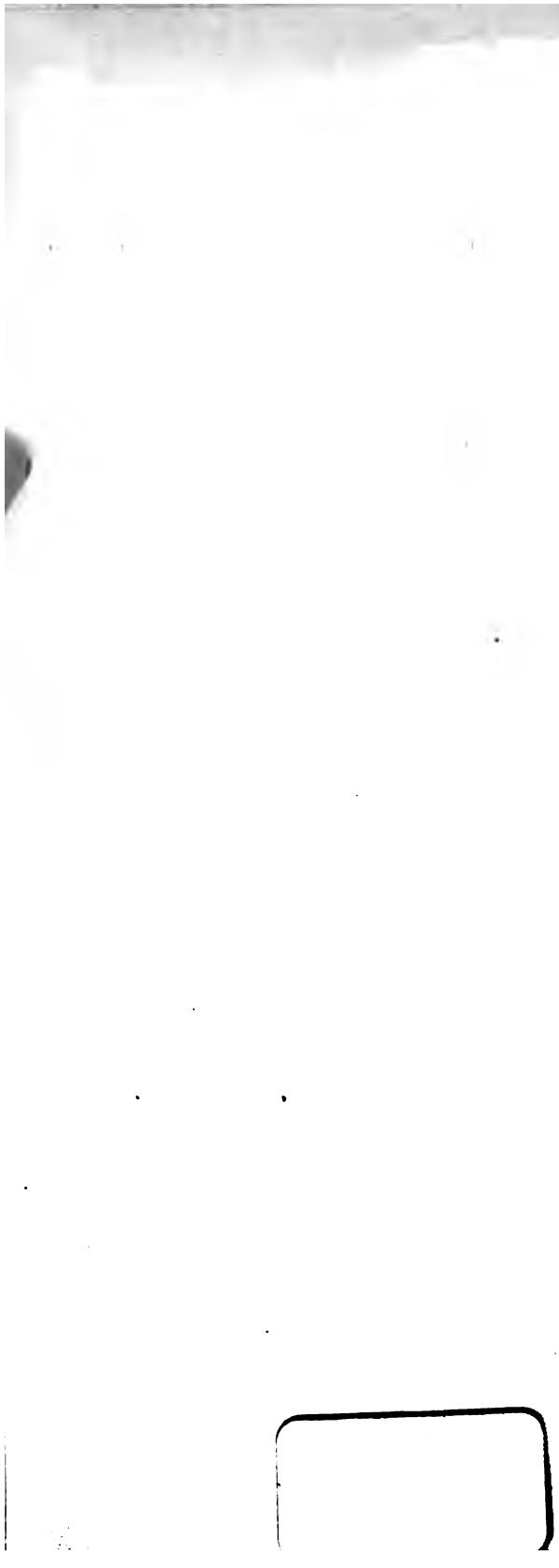
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DECIDED BY THE COURTS OF
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IN THE

UNITED STATES,

EDITED BY

THOMAS J. MICHIE.

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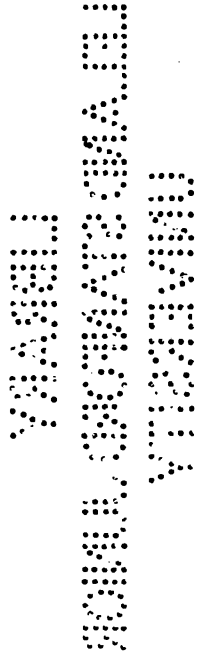


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BOUCHER *v.* NEW YORK, N. H. R. Co.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 15, 1907.)

[82 N. E. Rep. 15.]

Railroads—Grade Crossing—Duty to Maintain Gates.—The jury are authorized to find that the grade crossing, over nine adjacent railroad tracks, of a street along which five lines of electric street cars ran and many teams passed, was a dangerous crossing, at which it was the duty of the railroads owning the tracks to maintain gates and an agent to operate them, even though they had not received an order, under Rev. Laws, c. 111, § 192, so to do.

Master and Servant—Independent Contractor—Evidence.—Evidence that at a dangerous grade crossing of a street over railroad tracks, part belonging to defendant and part to two other railroads, there were gates on each side of the tracks, operated by a gate tender from a house midway the crossing, between tracks belonging to defendant, authorizes a finding that the business of operating the gates was defendant's and that the gate tender was its agent and representative, and not that of an independent contractor, notwithstanding evidence that the gates were being operated under some arrangement between defendant and one of the other railroads, and that such other railroad hired and paid the gate tender.

Same—Dangerous Business.*—The running of frequent railroad trains over a grade crossing in a crowded street is a business fraught with such danger to travelers that the railroad company cannot delegate to an independent contractor the operation of gates thereat and so escape liability for negligence of the gate tender.

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Joseph Boucher against the New York, New Haven & Hartford Railroad Company. Verdict was ordered for defendant, and plaintiff brings exceptions. Exceptions sustained.

Marvin M. Taylor, for plaintiff.

John L. Hall, for defendant.

KNOWLTON, C. J. The plaintiff was injured at a grade crossing of the defendant's railroad in Worcester. The undisputed evi-

*See extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317.

dence tended to show that he was driving down Front street, across the tracks of the defendant and of the Boston & Albany Railroad, directly in front of the union station; that the street crosses nine tracks at that point, the first five of which go under the arch of the station; that the first three of these are used by the New York Central & Hudson River Railroad Company under a lease from the Boston & Albany Railroad Company, and the fourth and fifth for the passenger service of the defendant's railroad; that the sixth, seventh and eighth are used for freight service, the sixth and eighth principally by the New York Central & Hudson River Railroad Company and the seventh by the defendant, and that the ninth was a spur track to the Bradley Car Works. There was evidence that five lines of electric cars run through the street and over these railroad tracks at this crossing, and that many teams pass there. Two gates were maintained on each side of the tracks, which were raised and lowered by a gate tender, whose gate house was near the center of the crossing at the east side of the street, between the fourth and fifth tracks. The plaintiff was driving southward, the gates were up on the north side of the crossing and he drove upon the tracks, but, before he got across them, the gates on the southerly side were seen to be down, and he stopped his horse. The evidence tended to show that, as he was driving upon the crossing, one of the defendant's trains was about to pass over it on the fifth track, and the gate tender started to put down the gates to exclude persons from the crossing. The gates on the northerly side were left up long enough to allow an electric car upon the crossing to pass off to the northward, and during that time the plaintiff and his companion drove on. Afterwards the gate tender raised the gates on the southerly side to let the plaintiff off, but lowered them again quickly, so that one of them came down between the horse and the plaintiff as he was sitting in the wagon, driving southward. The judge ruled, at the defendant's request, that the defendant was not liable for these acts of the gateman, and ordered a verdict for the defendant.

In the argument before us both parties have assumed, and we think rightly, that there was evidence for the jury on the questions whether the plaintiff was in the exercise of due care, and whether there was negligence on the part of the gateman. We must, therefore, consider the evidence bearing upon the relations of the gateman to the defendant.

We understand that the locations of the Boston and Albany Railroad and of the defendant's railroad are adjacent to each other at the crossing. The jury could hardly fail to find that this was a dangerous crossing, calling for great precaution for the safety of travelers on the street. Gates were maintained, to be raised and lowered by a gateman, to exclude travelers from the defendant's tracks while trains were passing. There was no evi-

dence to show whether the defendant had been ordered to maintain gates and an agent to open and close them, under Rev. Laws, c. 111, § 192. If it had it would be bound to obey the order, and would be liable for the negligence of its agent in the management of the gates. If there had been no such order, the jury well might find that it was the duty of the defendant to maintain such gates and a gateman for the protection of travelers on the street, and that it would be liable for accidents caused by its failure to do this. Eaton *v.* Fitchburg Railroad Company, 129 Mass. 364. The evidence tends strongly to show that, with or without an order under the statute, there were compelling motives of duty of pecuniary self-interest to induce the defendant to make provision for the operation of gates by the side of its tracks at this crossing. These gates were being operated at the time of the accident, and had been maintained and used for a long time. Without further evidence, the jury might well find that this business, being done on the defendant's premises, apparently in its interest, was the defendant's business. The evidence went further, and tended to show that it was being done under some arrangement made by the defendant with the New York Central & Hudson River Railroad Company, the nature of which was not disclosed. This strengthened the reasons for finding that the defendant owned and controlled the business, and that it was done in its interest, through the agency of the gate tender. Unless it appeared that the business had passed out of its control, so as to become as to proprietorship and right of control, the business of another, the gate tender in doing it was, in reference to liability to third persons, its servant and agent. It appeared that he was hired and paid by the New York Central & Hudson River Railroad Compnny. But this circumstance is not inconsistent with an arrangement whereby he was furnished to the defendant to do its business in the protection of its tracks, as its representative, for whose negligence it would be liable. The lending of one's servant to another party to act in his business, subject to his control, is common. The law in relation to it is discussed in Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328, and in cases there cited. It was also considered in the opinions in Dutton *v.* Amesbury National Bank, 181 Mass. 154, 63 N. E. 405. In the first of these cases the determining facts are stated as follows: "The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it. If he has done nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and in reference to the rights of

third persons who are affected by the work, is his servant." We are of opinion that there was evidence from which the jury might have found that this business was never taken out of the proprietorship or right of control of the defendant, and that, in relation to third persons, the gate tender was its servant or agent.

The testimony is entirely consistent with the existence of such an arrangement as appeared in Brow *v.* Boston & Albany Railroad Company, 157 Mass. 399, 32 N. E. 362, in which it was shown that the Boston & Albany Railroad Company employed a gateman and paid him, and received a repayment of a part of his wages from the two other railroad corporations whose tracks were a part of the same crossing. Although the question was not before the court, it was intimated in the opinion that the jury might find that the three railroad companies jointly "employed a common agent, for whose torts, in the performance of his duty, each and all were responsible."

It was not necessary that the plaintiff should satisfy the jury under what arrangement the business of guarding its crossing was being done. It was enough if evidence was introduced from which an inference could be drawn that the business was the defendant's and that the person doing it was its agent and representative.

The view most favorable to the defendant would be that, by the arrangement with the New York Central Company, that company became an independent contractor with the defendant, and undertook to do the business of protecting the defendant's railroad with gates, in such a way as to leave it with no right to control, direct or manage it. If that were the arrangement, the gate tender would not be the defendant's servant. But it does not follow that the defendant would not be liable for his failure to use due care for the protection of travelers at the crossing. If the gates were maintained in obedience to an order made under the Rev. Laws, c. 111, § 192, we think it plain that the corporation could not relieve itself from liability for negligence in the maintenance and management of them by an arrangement with an independent contractor. By the terms of the statute they are to be maintained by the corporation's agent, and the corporation is to be responsible for their proper maintenance. Even if there were no such order, and if the jury found that it was the defendant's duty to maintain them for the protection of the public, we are of opinion that it was a duty that could not be delegated, either to a contractor or to a servant, in such a way as to relieve the corporation from the obligation to see that due care was exercised for the safety of travelers. It is a principle of law that, when one is conducting a business the necessary effect of which is to expose others to great danger, so that he ought to take precautions for their safety, he is responsible for the negligence of an independent contractor to whom he intrusts the performance of this

duty. Woodman *v.* Metropolitan Railroad Company, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; Curtis *v.* Kiley, 153 Mass. 123, 26 N. E. 421; Blessington *v.* Boston, 153 Mass. 409, 26 N. E. 1113; Pye *v.* Faxon, 156 Mass. 471, 31 N. E. 640. We are of opinion that the running of frequent railroad trains, over a grade crossing in a crowded street in a great city is a business fraught with such danger to travelers as to impose upon the railroad corporation that runs them a duty to take precautions for the safety of the travelers, which comes within the principle just stated. This too is intimated, although not expressly decided, in Brow *v.* Boston & Albany Railroad Company, *ubi supra.*

Exceptions sustained.

BECKMAN *v.* LINCOLN & N. W. R. CO.

(Supreme Court of Nebraska, May 24, 1907.)

[112 N. W. Rep. 348.]

Eminent Domain—Exercise of Power.—A railroad company cannot exercise the right of eminent domain, except to take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its own road, and it has no authority to take land for the use of another company in the construction of the road of the latter.

Same—Rights of Lessor Railroad.*—A railroad company which has leased its lines may, if the lease so provide, extend its lines for the benefit of its lessee, and for this purpose may maintain condemnation proceedings in its own name.

Same—Enjoining Exercise of Power—Burden of Proof.—Where a plaintiff, in an action to restrain a railroad company from entering upon his land and constructing a railroad, pleads that the defendant company has instituted condemnation proceedings and deposited the damages as required by law, and that the road is being constructed across his land pursuant to such proceedings, and that the proceedings are void because the road is in fact being constructed by and for another company, the burden is upon him to prove the latter allegation.

Same—Sufficiency of Evidence.—Evidence examined, and held insufficient to establish the plaintiff's allegation that the road is not in

*For the authorities in this series on the question as to who may exercise the power of eminent domain, see foot-notes appended to Caretta Ry. Co. *v.* Virginia-Pocahontas Coal Co. (W. Va.), 24 R. R. R. 761, 47 Am. & Eng. R. Cas., N. S., 761.

fact being constructed by and for the corporation which is seeking to obtain the right of way by condemnation proceedings.

(Syllabus by the Court.)

Appeal from District Court, Lancaster County; Frost, Judge.

Action by Fred Beckman against the Lincoln & Northwestern Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed, and case dismissed.

J. W. Deweese and *F. E. Bishop*, for appellant.
Field, Ricketts & Ricketts, for appellee.

SEDGWICK, C. J. This action is brought to restrain the Lincoln & Northwestern Railroad Company, a corporation, from entering upon the plaintiff's land and constructing, or permitting the Chicago, Burlington & Quincy Railroad Company to construct, a railroad thereupon, claiming the right by virtue of certain condemnation proceedings. The defendant, the Lincoln & Northwestern Railroad Company, was incorporated under the laws of this state in 1879 to construct a line of railroad from the city of Lincoln, Neb., to Columbus, Neb., and thence to the north boundary of the state. The road has been constructed as far as to Columbus. In the following year it leased its right of way and all of its property and franchises to the Burlington & Missouri River Railway Company in Nebraska (a corporation also organized under the laws of this state) for the period of 999 years. Afterwards the Chicago, Burlington & Quincy Railroad Company purchased the road and property of the Burlington & Missouri River Railway Company, including the lease from the defendant company. In May, 1906, the defendant company began proceedings in the county court of Lancaster county to condemn a right of way across the plaintiff's land for the construction of a railroad. On its application appraisers were appointed, and the plaintiff's damages appraised, and the amount so found was deposited by the defendant company with the county court, and afterwards appeals were taken by both parties to the district court. Those appeals are still pending. While the application was pending in the county court, and before the damages had been assessed, the plaintiff sought to question in that court the right and authority of the defendant to exercise the right of eminent domain, but was not permitted to do so by reason of lack of jurisdiction to determine such a question. The plaintiff then began this action in the district court of Lancaster county. Upon the trial of the action in the district court, judgment was entered enjoining the defendant as prayed, and from that judgment the defendant has appealed to this court.

1. The defendant objects that the plaintiff is not entitled to relief by injunction, and that the relief which the plaintiff seeks could only be obtained in an action of quo warranto to deter-

mine the rights and powers of the defendant corporation. We do not see any merit in this objection. The matters complained of in the petition are not that the defendant is seeking to exercise powers not given it by its articles of incorporation under the law. It is not claimed that the defendant is without the general power to exercise the right of eminent domain, but that its attempted exercise of that right in this particular case is unlawful. There can be no doubt that a court of equity may enjoin a corporation from exercising its corporate powers in an unlawful manner to the injury of an individual, when the ordinary course of the law affords no adequate remedy. Under the law of this state as it has been construed, the landowner, when his property is taken by a railroad corporation in condemnation proceedings by virtue of the right of eminent domain, has no adequate remedy in those proceedings against the wrongful taking of the property for other purposes than for the necessary uses of the corporation seeking to condemn the land. In Mattheis *v.* Fremont, E. & M. V. R. R. Co., 53 Neb. 681, 74 N. W. 30, it is determined that the county court has no jurisdiction to afford such relief. An appeal to the district court does not vacate or supersede the proceedings in the county court so as to prevent the railroad company from proceeding with the construction of its road upon the land, which may be completed and the road in operation before the matter is finally heard in the district court. Any relief that the district court might then afford cannot be said to be adequate. On the other hand, it is equally clear that the corporate existence of the defendant cannot be attacked, nor its right to exist and exercise its corporate franchises challenged, by a private individual in this form of action.

2. The contention of the plaintiff is, in substance, that the defendant is not engaged in the construction of the line which crosses his land, but that the same is being constructed by the Chicago, Burlington & Quincy Railroad Company for its own use and benefit; that the nearest point on defendant's line of railroad is more than two miles from his premises; and that the condemnation proceedings are not prosecuted in good faith for the proper use of the defendant, and are in fraud of plaintiff's rights. The contention of the plaintiff that "a railroad company cannot use its powers of eminent domain to acquire a right of way for another company's road" is manifestly right. "Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use if its road." Cobby's Ann. St. 1903, § 9967. It clearly has no authority to take land for the use of another company in the construction of the road of the lattter. No one would contend that this defendant company could go into a distant county of the state and condemn land for

the construction of a road in which it would have no interest when constructed, a road that would be the property of another company and used exclusively by that other company. The Lincoln & Northwestern Railway Company may condemn land necessary for the construction of its road, but it cannot condemn land for the construction of a road by and for the Chicago, Burlington & Quincy Railroad Company, or any other company; and the principal question in this case is whether this land is being taken for the construction of the road of the defendant in this action, or whether it is in fact being taken for the construction of the road of the Chicago, Burlington & Quincy Railroad Company. It appears from the record that the latter company, which is sometimes spoken of as "The Burlington," operates a line of road from Chicago, through Omaha and Lincoln, to Denver, and that the road of the defendant company, as before stated, extends from Lincoln to Columbus. The two roads are thus connected for interchange of traffic at Lincoln. They use the Lincoln "yards" in common, and have done so for many years. The improvements now being made involve a reconstruction of the lines of both roads west and northwest of Lincoln, and also of the railroad yards used in common. The particular part of the road in question is to extend from a point near Denton, which is a few miles west of Lincoln on the Burlington Line, into these common yards, and together with other improvements and lines will afford a new route of connection between the two lines. It is argued in the brief that this new line in question, extending as it does from the Burlington Line to the yards used in common, is intended principally, if not entirely, for the use of the Burlington Company, and must for that reason be held to be an extension of the Burlington Line, and not a branch of the defendant's line. We do not think that this distinction is meritorious. The statute provides that railroad companies may "construct branches from the main line to other towns and places within the limits of this state." Section 9953. Trester *v.* M. P. R. R. Co., 33 Neb. 180, 49 N. W. 1110. If the yards used in common are the yards of the Burlington Company, and the defendant company's road runs into those yards, it might extend its line through those yards to another road, and so make connections therewith. In such case the state would not be interested in the question as to which company was in fact building the connecting line. The statute quoted will not admit of a construction that would prohibit the defendant company from building such connection, and as that part of the line which is in question here connects with both roads, and will or may be used by both roads in the interchange of traffic, it is clear that either road might build the line, and the road that was so building the line in good faith might exercise the right of eminent domain to secure the necessary right of way for that purpose. When the defendant leased its right of way and prop-

erty and franchises to the Burlington & Missouri River Company for 999 years, as before stated, that company took over the property and began operating the same in connection with its other lines of road, until it was consolidated with its successor, the Chicago, Burlington & Quincy Railroad Company, which latter company has since been and still is operating the same in the same manner.

The effect of this lease, and the rights of the parties thereto in regard to condemnation proceedings, were considered and determined in Dietrichs *v.* L. & N. W. Ry. Co., 13 Neb. 361, 13 N. W. 624, and Gottschalk *v.* L. & N. W. R. R. Co., 14 Neb. 389, 15 N. W. 695, and it was held that the fact that this defendant had executed a lease of all of its property for so long a term, with the conditions and provisions set forth in the opinions referred to, did not prevent the defendant company from extending its lines for the benefit of the lessee, and that in doing so this defendant might maintain condemnation proceedings in its own name. We consider these cases as settling the law upon these questions in this state, and they are well supported by authorities in other jurisdictions. Mayor of Worcester *v.* Norwich Railroad Co., 109 Mass. 103; Chicago & Western Ind. R. R. Co. *v.* Ill. Cent. Co., 113 Ill. 156; Lower *v.* C., B. & Q. R. R. Co., 59 Iowa, 563, 13 N. W. 718; Chicago Company *v.* People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; State *v.* Superior Court, 31 Wash 445, 72 Pac. 89, 66 L. R. A. 897. The railroad company seeking to condemn land can only do so when the land is necessary for the construction of its road; but, on the other hand, a railroad company which has leased its road and franchises and property for a term of years may still make extensions and build branch lines, and the fact that the same are to be used by another company, its lessee, and that other company is to have the exclusive beneficial interest in the use of the property, will not prevent the prosecution of condemnation proceedings in the name of the company that is actually building the same. If it is the road of the defendant that is being constructed, the condemnation proceedings should be in the name of the defendant; but, if it is the road of some other company that is being constructed, then the condemnation proceedings could not be maintained by this defendant.

The question at issue is one of fact, and not of law, and requires an examination of the record. The trial is one de novo in this court, under section 1705a, Cobbey's Ann. St. 1905, and must be determined here in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. The first point necessary to determine is: Upon whom is the burden of proof?

In every case all allegations necessary to the plaintiff to make out his case and entitle him to the relief he asks must be proved by him. If an allegation material to the plaintiff's case is essen-

tially negative in its character, the rule remains the same. "Whenever, under the rules of substantive law applicable to the rights or liabilities in dispute between the parties, an affirmative case requires proof of a material negative allegation, the party, whether plaintiff or defendant has the burden of proving it." 16 Cyc. 927, and cases cited. This proposition is discussed at large in Goodwin *v.* Smith, 72 Ind. 113, and in a note to the same case found on page 148, 37 Am. Rep. The court in its opinion, quoting from a prior case in the same court, said: "Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms." In Stokes *v.* Stokes, 156 N. Y. 662, 50 N. E. 1122, it was said, in the syllabus, that the defendant "was bound to establish his defense or counterclaim, although it required the proof of a negative, and that he did not sustain this burden of proof by testifying that he deposited the bonds as security for the notes, without stating that they were deposited for no other purpose;" and the court, quoting from the case of Lamb *v.* Transportation Company, 46 N. Y. 271, 7 Am. Rep. 327, said: "It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence which, uncontradicted, proves the fact alleged by him. It has in such cases frequently been said that the burden of proof was changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this, and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases the party holding the affirmative is still bound to satisfy the jury affirmatively of the truth of the fact alleged by him, or he is not entitled to a verdict"—and citing several other cases. In Brown *v.* King, 46 Mass. (5 Metc.) 173, the court, at page 181, said: "Where a party grounds his title on an allegation, whether affirmative or negative, he must prove it. Presumptive evidence of title, although sufficient to make out a good prima facie case, does not necessarily change the burden of proof." In Royal Ins. Co. *v.* Schwing, 87 Ky. 410, 9 S. W. 242, the court, after stating that averments that were necessary in the petition must be proved by the plaintiff, although they were of a negative character, said: "The defendant, however, if the petition was defective, cured the defect by pleading the fact that the fire resulted from the fall of the building. Still this did not place the burden on the company, if the plaintiff was required to aver and prove the nonexistence of a state of facts that would exonerate the company from liability when developed." In Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. 715, the court quoted with approval from 2 Whart. Ev. § 354, as follows: "Whenever, whether in plea or replication or rejoinder or surrejoinder, an

issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof." In Gillson *v.* Price, 18 Nev. 109, 1 Pac. 459, the court said: "Where a party grounds his right of action upon a negative allegation, he must prove it. It is then material, and a denial raises a material issue." See, also, a full discussion of the proposition and of the meaning and application of the rule in 2 Enc. Ev. 802, where the rule is thus stated: "It is now well settled that, if a negative allegation is essential in asserting a right, whether on the part of the plaintiff or defendant, the one asserting the right has the burden of proving the negative, although he may have failed to make such allegation."

There has been much discussion by various courts on the subject of burden of proof, and whether the burden of proof does or can in any case shift during the progress of the trial. It is clearly pointed out in the authority last cited that upon the substantive issue between the parties the burden of proof never shifts; that the words "burden of proof" are sometimes used in a secondary sense. In many cases the party having the burden of proof is assisted by presumptions. In some cases the presumptions are so strong that his adversary is required first to introduce some proof. To say, under such circumstances, that his adversary has the burden of proof, means only that he has the burden to introduce a certain quantum of proof, and when he has done so the issue is tried and the evidence weighed as upon any other issue; the party making the allegation having the burden of proof upon that issue. This is the logical use of the words "burden of proof." The party making the allegation of fact, whether it be an affirmative or a negative, must, when the evidence is all in, have furnished more proof upon that fact than his adversary has, or he fails to establish his case. It is in this sense that the authorities above cited hold that, when the allegation of a negative fact is necessary to the statement of the plaintiff's case, the burden of proof is upon him who alleges it to establish his case.

The plaintiff in this case assumed this burden upon the trial. He alleged in his petition that the defendant had begun condemnation proceedings in the county court to obtain a right of way across his land; that the amount of his damages occasioned by the taking of the land had been ascertained and allowed by the proceedings in the county court; that the amount had been deposited by the company pursuant to the statute; that he had taken appeal from the allowance of these damages to the district court, where the same is now pending; that in pursuance of those proceedings a railroad was being built across his land. His petition shows that the road is being built for actual use as a public railroad, and that it will be an important part of a public system of railroads, so that the allegations of his petition

show that it is a plain case of right to condemn this right of way, except for one controlling fact, which he alleges to exist, viz.: That this road across his land is being built by and for another corporation as owner thereof, and not by and for the company instituting the condemnation proceedings, so that his cause of action that he has pleaded and presented to the court depends entirely upon this allegation. If the road is being built by and for another company, his action can be maintained. If it is being built by and for the company which instituted the condemnation proceedings, he has no cause of action. "The party who would be defeated if no evidence were given on either side must first produce his evidence." Cobbey's Ann. St. 1903, § 1267. We must take the issues as they are. The plaintiff has presented a case which depends upon the allegations of the ownership of the road which is being built, and plainly upon this issue so presented he has the burden of proof. To maintain this issue on his part he called Mr. Westervelt as a witness. This witness was employed as a right of way man to procure the right of way for this road. He asked this witness for whom he was acting in procuring this right of way, and the witness testified that he was acting for this defendant. This was direct testimony that this defendant was building this road as owner thereof, and it is not weakened by the fact that the witness testified that he was the agent for the defendant. Agency may not be established by proof of unsworn declarations of the supposed agent, but the testimony of the agent himself is direct evidence of the fact of his employment, and is not weakened by the fact that he is in a position to know for whom he is acting. The plaintiff also proved by this witness that he also acted as right of way agent for the Chicago, Burlington & Quincy Railroad Company, and that this company operates a line of road from Chicago to Denver, which line is owned by several distinct corporations, and that all of the lines of these corporations were either owned or leased by the Chicago, Burlington & Quincy Railroad Company, and that the line of road now being operated runs through Mr. Beckman's land. The plaintiff also proved by the witness that the checks which he drew in payment for right of way for the construction of this new line of road in question were drawn upon the Chicago, Burlington & Quincy Railroad Company. That he receives his salary as right of way man from the Chicago, Burlington & Quincy Railroad Company; but each month he makes an apportionment of his salary among the different subsidiary companies, which is sent to the auditor and charged to the different railroads. It appears from his evidence that the money used to pay for the right of way for this new line is furnished by the Chicago, Burlington & Quincy Railroad Company. It also appears from the evidence of this witness that the vouchers given for the checks drawn upon the Chicago, Burlington &

Quincy Railroad Company for money used in the building of this line, and in paying for the right of way, and in paying the damages for injuries to the crop of the tenant upon the land in question, were marked with the letters "A F. E. L. & N. W."; that these letters stand for the words "Authorized for Expenditure Lincoln & Northwestern"; and that they are so identified for the purpose of enabling the auditor of accounts to charge the expense of procuring this right of way and building this line to the defendant, the Lincoln & Northwestern Railroad Company. The plaintiff admits that, so far as his damages are concerned, it is immaterial whether this railroad is to be built by the one or by the other corporation. He stands upon his strict legal rights, and alleges that the fact is that the railroad is not being built by the corporation in whose name the right of way is being condemned as the owner of the road, and he insists that the evidence which he has produced is sufficient to establish that fact. It seems clear that he has not established that fact by a perponderance of the evidence.

The defendant offered in evidence a paper purporting to be a copy of the minutes of a meeting of the board of directors of the defendant company authorizing the construction of the line in question. This document was excluded by the district court as secondary evidence. This ruling of the district court was probably correct.

The plaintiff has failed in the proof necessary to establish his cause of action, and the judgment of the district court is therefore reversed, and the case dismissed.

LAWRENCE, State's Atty. of Rutland County *v.* RUTLAND R. Co.

(Supreme Court of Vermont, General Term, Nov. 16, 1907.)

[67 Atl. Rep. 1091.]

Corporations—Corporate Existence and Franchise—Amendment of Charter.—A reservation in a charter of a corporation or in the general law of power to amend, alter, or repeal places under legislative control all rights, privileges, and immunities derived directly from the state including its very existence, but rights and interests acquired by the corporation not constituting a part of the contract of incorporation and not so derived directly from the state stand on a different footing, and are not thereby subjected to legislative control.

Constitutional Law—Due Process of Law—Weekly Payment Act.*—Act Dec. 10, 1906, p. 114, No. 117, requiring a mining, quarrying, manufacturing, etc., or railroad corporation to pay its employees each week, and that payment shall be in lawful money, is not, as to a railroad corporation, whose charter provides that it shall be subject to amendment, alteration, or repeal, and subject also to the general law to the same effect, a deprivation of liberty or property, as to either requirement without due process of law in violation of Const. U. S. Amend. 14, nor is it as to the stockholders of such corporation.

Same—Equal Protection of Laws.*—Act Dec. 10, 1906, p. 114, No. 117, requiring a mining, quarrying, manufacturing, etc., or railroad corporation to pay its employees each week, and that payment shall be in lawful money, is not, as to a railroad corporation, a denial of the equal protection of the laws, in violation of Const. U. S. Amend. 14, though not including all corporations, the rule being that special legislation does not contravene the equality clause of that amendment if within the sphere of its operation all persons within its provisions are treated alike.

Statutes—Void in Part—Effect.*—Even if Act Dec. 10, 1906, p. 114, No. 117, requiring a mining, quarrying, manufacturing, etc., or railroad corporation to pay its employees each week, and that payment shall be in lawful money, should include corporations that it should not, it would not be thereby invalidated as to a railroad corporation as to which it is otherwise valid.

Constitutional Law—Equal Protection of Laws.*—Act Dec. 10, 1906, p. 114, No. 117, requiring a mining, quarrying, manufacturing,

*For the authorities in this series on the constitutionality of statutes prescribing a penalty to compel common carriers to perform their duties, etc., see foot-note appended to Lexington Grocery Co. *v.* Southern Ry. Co. (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349, where all the preceding authorities are collected; foot-notes appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

etc., or railroad corporation to pay its employees each week, and that payment shall be in lawful money, is not subject to the objection that the act cannot operate alike on all within its provisions because it includes foreign corporations as to which the Legislature is without power of amendment of charters, since, though the Legislature is without power of amendment, foreign corporations are as amendable to the laws of the state as to the business done therein as are domestic corporations.

Same—Liberty to Contract.*—Act Dec. 10, 1906, p. 114, No. 117, is not invalid as restricting the rights of railroad employees to contract with their employer, such restriction not being direct, but resulting from the restriction of the employer's right, and that restriction being valid as to the employer.

Same—Bill of Rights.*—Act Dec. 10, 1906, p. 114, No. 117, requiring a mining, quarrying, manufacturing, etc., or railroad corporation to pay its employees each week, and that payment shall be in lawful money, is not as to a railroad corporation, whose charter provides that it shall be subject to amendment, alteration, or repeal, and subject, also, to the general law to the same effect in contravention of the declaration of the Bill of Rights that all men are born equally free, and have certain natural rights amongst which are acquiring, possessing, and protecting property, or the declaration that every member of society "hath a right to be protected in the enjoyment of life, liberty, and property."

Exceptions from City Court of Rutland; N. K. Farnsworth, Judge.

Action by Robert A. Lawrence, state's attorney, against the Rutland Railroad Company to recover a penalty for a violation of the weekly payment law. Acts 1906, p. 114, No. 117. Heard on agreed statement of facts and general demurrer. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

C. C. Fitts, Atty. Gen., and *R. A. Lawrence,* State's Atty., for plaintiff.

H. Henry Powers, for defendant.

ROWELL, C. J. The question is whether the weekly payment act (act Dec. 10, 1906, p. 114, No. 117) is constitutional. It provides that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation corporation, and an incorporated express, water, electric light or power company, doing and transacting business in this state, shall pay each week, in lawful money, each employee engaged in the business the wages earned by such employee to a day nor more than six days

*See foot-note on preceding page.

prior to the date of such payment, provided that, if at any time of payment an employee is absent from his regular place of labor, he shall be entitled to such payment on demand. It further provides that no such corporation shall pay its employees in script, vouchers, duebills, nor store orders, except it be a co-operative corporation in which the employee is a stockholder, but shall, on request of such shareholding employee, pay him as provided in the act. It further provides that no assignment of future wages payable thereunder shall be valid, if made to the corporation from which such wages are to become due, or to any one in its behalf, or if made or procured to be made to any one for the purpose of relieving such corporation from the obligation to pay according to the act; and that no corporation shall require an agreement from an employee to accept wages at any other period as a condition of employment. The act penalizes each failure to pay as therein required, and this action is brought to recover a penalty for one such failure. As the case is presented, the defendant does not question its liability if bound by the act. The defendant's charter, granted in 1867, provides that it "shall be subject to the action of any future Legislature to amend, alter, or repeal as the public good may require." Before and at the time of this grant, the general law was, even since has been, and still is, to the same effect as to all acts creating, continuing, altering, or renewing a corporation or body politic. The plaintiff claims that, as to charging the defendant's charter, the act in question does not go beyond the scope of the power therein reserved for that purpose; nor beyond the general law in that behalf, which being in force when the charter was granted and still in force, must be read into it as a part of it; and, besides, that the act is a proper exercise of the police power of the state. The defendant denies this, and contends that the act contravenes both the federal Constitution and the state Constitution—the federal Constitution, because it deprives the defendant of liberty and property without due process of law, and denies to it the equal protection of the laws; the state Constitution, because it contravenes the declaration of the Bill of Rights that "all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending of life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety," and also because it contravenes the further declaration of the Bill of Rights that "every member of society hath a right to be protected in the enjoyment of life, liberty, and property."

The questions arising under the federal Constitution will be first considered, for their determination will largely dispose of those arising under the state Constitution. It is needless to say that on the federal questions the decisions of the federal Supreme Court are controlling, so we shall not go much outside of them. And it

may be said, *in limine,* that they settle that a corporation is a person, within the meaning of the due process clause and the equality clause of the fourteenth amendment; and that a corporate charter is a contract between the state and the corporators, and protected by the federal Constitution, like any other contract, from legislation impairing its obligation. To show that the act in question is within the power to amend reserved in the defendant's charter and in the general law, the plaintiff relies largely on St. Louis, Iron Mountain & Southern Railway Co. *v.* Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, which was error to the Supreme Court of Arkansas, and involved the constitutionality of a statute of that state providing that when any railroad company, or any company, corporation, or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, discharged, with or without cause, or refused further to employ, any servant or employee the unpaid wages of such servant or employee then earned at the contract rate, without abatement or deduction, should be and become due and payable on the day of such discharge or refusal, and, if not paid on such day, then, as a penalty for nonpayment, the wages should continue at the same rate until paid, but not more than 60 days, unless an action was brought therefor within that time. The action was to recover both wages and penalty. The Constitution of that state provided that corporations might be formed under general laws, which might be altered or repealed from time to time; that the General Assembly should have power to alter, revoke or annul any charter of incorporation then existing and revocable, or any that might thereafter be created, whenever, in its opinion, it might be injurious to the citizens of the state; in such manner, however, that no injustice should be done to the corporators. The federal Supreme Court affirmed the judgment below, which sustained the statute as within this reserved power of amendment, as far as it affected corporations, and as not violative of the fourteenth amendment nor of the Constitution of the state, which is substantially like the declarations of our Bill of Rights relied upon, following the case of Leep *v.* Same Defendant, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109, in which the statute was held unconstitutional as to subjects of contract purely and exclusively private, unaffected by any public interest or duty to person, society, or government, and the parties are capable of contracting, as to which, it was said, no condition can exist warranting legislative interference for the purpose of prohibiting the contract or controlling its terms. It was contended above in the Paul Case that, as to railroad corporations organized before its passage, the act was void because it violated the fourteenth amendment. But the court said that corporations are creatures of the state, endowed with such faculties as the state

bestows, and subject to such conditions as the state imposes, and, if the power to modify their charters is reserved, the reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation, and that as the amendment then in question rested on reasons deduced from the peculiar character of the business of the corporations affected, and the nature of their functions, and applied to all alike, the equal protection of the laws was not denied. The further question was whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the federal Constitution. The court said that the power to amend could not be used to take away property acquired under the operation of the charter, nor to deprive a corporation of the fruits of contracts lawfully made that had been reduced to possession; but that alterations or amendments could be made that would not defeat, nor substantially impair, the object of the grant nor any rights that had vested under it and which the Legislature might deem necessary to secure that object, or other public or private rights; that the act in question was purely prospective, and did not interfere with vested rights, existing contracts, nor destroy, nor sensibly encroach upon, the right to contract, although it did impose a duty in relation to the payment of wages actually earned that restricted future contracts in the particular named. In view of the fact that the corporations embraced in the act were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the court below held the regulation promotive of the public interest in the protection of employees to the limited extent stated, and properly within the reserved power to amend. The court above said that inasmuch as the right to contract was not absolute, but might be subjected to the restraints demanded by the safety and welfare of the state, it did not think that the conclusion below in its application to the power to amend could be disputed on the ground of infraction of the fourteenth amendment. But it is said that the case is not authority, because when the defendant in error was discharged, his wages earned became due and payable at once at the common law, and that the action was maintainable on that ground alone. But, however that was to the wages, it was scarcely so as to the penalty, for that would not accrue at common law, and recovery was had for both. And, besides, no such question was suggested in the case, which was put exclusively on the constitutionality of the act, and so it must be regarded as authority on that question. And the court recognized it as such in the memorandum case of Minneapolis, etc., R. R. Co., *v.* Guano, 190 U. S. 557, 23 Sup. Ct. 854, 47 L. Ed. 1183, which was affirmed on the strength of it and of other cases. And it is in accord with the decisions of that court generally on the question of how far a reservation in a charter or in a general law of power to amend,

alter, or repeal, as the public good may require, authorizes legislative control of the corporation. The rule deducible from those decisions, shortly stated, is substantially this, we think: That such a reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state, including its very existence; but that rights and interests acquired by the corporation, not constituting a part of the contract of incorporation, and so not derived directly from the state, stand on a different footing, and are not thereby subjected to legislative control. Thus, in Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 21 L. Ed. 204, exemption from taxation granted in an amendment of a charter, not made on a consideration moving to the state, was held revocable under a power contained in a genaral law antedating the charter. The court said that it was true that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character; and that it might be equally true, as claimed, that the exemption from taxation added largely to the value of the stock of the corporation, and induced the defendant in error to purchase the shares held by him, but that those considerations could not be allowed any weight in determining the validity of the subsequent taxation; that the reserved power authorized any change in the contract of incorporation as it originally existed, or as subsequently modified, or its entire revocation; that the original corporators and the subsequent stockholders took their interests with notice of the power, and of the possibility of its exercise at any time in the discretion of the Legislature; that the object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form that will preclude legislative interference with their exercise if the public interest should at any time require such interference; that it is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, would be irrepealable, and protected from any measures affecting its obligation; that the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state; but that rights acquired by third persons, which have become vested under the charter, in the legitimate exercise of its powers, stand differently. There the state contended only for power under the reservation to modify its own contract with the corporators, not for power to revoke contracts of the corporation with other parties, nor to impair any vested rights thereby acquired. Railroad Co. *v.* Maine, 96 U. S. 499, 24 L. Ed. 836, is to the same effect. But the alterations must be reasonable, made in good faith, and consistent with the scope and object of the act of incorporation, for beyond the sphere of the reserved power the vested rights

of corporators are surrounded by the same securities, and are as inviolable as are such rights in other cases. Shields *v.* Ohio, 95 U. S. 319, 324, 24 L. Ed. 357.

The doctrine of these cases is approved and applied in the Sinking Fund Cases, 99 U. S. 70, 25 L. Ed. 496. There it was held that, by virtue of a reserved power to amend, Congress could require the plaintiffs, which were railroad corporation, to set aside a portion of their current income as a sinkink fund to meet certain of their mortgage debts when they matured. As to the Union Pacific Company, which was a government corporation, the court said it was safe to say that, whatever rules Congress might have prescribed in the original charters for the government of the corporation in the administration of its affairs, it retained the power to prescribe by amendment; that it could not undo what had been done, nor unmake contracts that had been made, but that it could provide for what should be done in the future, and direct what preparations should be made for the due performance of contracts already entered into; that it could originally have prohibited the borrowing of money on mortgage, or said that no bonded debt should be contracted without ample provision by sinking-fund to meet it at maturity; that, not having done so at first, it could not then, by direct legislation, vacate mortgages already made under the power originally granted, nor release debts already contracted, but that a prohibition against contracting debts in the future would not avoid debts already contracted. The Centeral Pacific Company, which was a state corporation, was held to be within the act of Congress for special reasons. We are referred to some of the dissenting opinions in those cases. But they are not authoritative. They recognize the rule, however, and deny only its application. Thus it is shown how far a reserved power to amend, alter, or repeal a charter as the public good requires authorizes legislative control of the corporation; and by that rule the act in question must be tested, for that is the power reserved in the defendant's charter and in the general law. It is true that requiring the defendant to pay weekly restricts its right to contract with its employees for a longer period of payment; and this, the defendant says, cannot be done, for it was chartered to build and operate a railroad, and, although nothing is said in the charter about the right to contract, yet that right exists, for without it a railroad could neither be built nor operated; that the grant carried with it all incidental powers necessary to make it effective for the purpose for which it was made; that, as long as the road is operated, so long the right to contract must continue; that the right to make contracts for the payment of wages is a part of the franchise granted, and is a vested right, protected by the fourteenth amendment, and therefore cannot be disturbed by the Legislature by amendment of its charter, by the exercise

of the police power, nor otherwise however. But that argument is untenable because it fails to note the reserved power to amend, which is a part of the charter contract, and no change within the scope of that power, which is limited to the requirements of the public good, can be said to impair the obligation of that contract, for the corporators must be taken to have assented in advance to all such changes. And that the act is within the scope of that power cannot be doubted, for its requirement, especially as far as it relates to the defendant and to the class to which it belongs, which are clothed with a public trust, and discharge duties of public concern, affecting the community at large, is promotive of the public good in protecting their employees to the limited extent it does. Nor does that requirement destroy, nor sensibly encroach upon the right to contract but only modifies that right, which is not absolute, but is subject, on general principles, to such reasonable restraint as the public good may require. It is the general right to acquire and possess property, and, by necessary implication, the general right to contract concerning it, that the Constitution protects. But that protection does not make those rights absolute in every particular. If it does, what becomes of the police power, which inheres in every free government, and is based on the maxim, *"Sic utere tuo ut alienum non lædas,"* which, as the federal Supreme Court says, is of universal and pervading obligation, and a condition on which all property is held; that its application to particular conditions must necessarily be within the reasonable discretion of the legislative power; and that, when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection. Orient Insurance Co. *v.* Daggs, 172 U. S. 557, 566, 19 Sup. Ct. 281, 43 L. Ed. 552. This doctrine is equally applicable here, for the reserved power with which we are dealing, like the police power, is, as we have said, limited by the requirements of the public good.

The case at bar is not distinguishable from the Paul Case, for there, as here, the corporation was clothed with a public trust, and discharged duties of public consequence, affecting the community at large, and the time of payment was fixed by statute, regardless of the contract. Nor is it distinguishable from the Sink Fund Cases, for there the corporations were virtually made to pay their debts before they became due. And it is well within Tomlinson *v.* Jessup, for there an exemption from taxation contained in a charter, not made on a consideration moving to the state, was held revocable, when deemed by the Legislature to be for the public good. Therefore the act does not deprive the defendant of liberty nor property in contravention of the fourteenth amendment because it requires weekly payments. Nor does it because it requires payment in lawful money, for the medium of payment is as much within the scope of the reserved power as

the time of payment. Indeed, it is held that in some cases the medium of payment is within the police power. Thus, in Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, a statute of Tennessee was upheld on that ground, which required, in certain circumstances, the redemption in lawful money of coupons, script, store orders, and other evidence of indebtedness issued by employers in payment of wages due to employees. It was there objected that no power to amend was reserved in the plaintiff's charter. But the court said that, although in the Paul Case stress was laid on the reserved power to amend, yet, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power may, within defined limits, extend over corporations outside, and regardless, of the power to amend charters. In that case the employees were considered to be at a disadvantage with the employers in the matter of wages, they being miners and coal workers. The case is referred to approvingly in Lochner *v.* New York, 198 U. S. 45, 55, 25 Sup. Ct. 539, 49 L. Ed. 937.

Nor does the act deny to the defendant the equal protection of the laws. True, it does not include all corporations doing business in the state; but it includes all of the particular class to which the defendant belongs, namely, all railroad corporations, and all telegraph and all telephone corporations, and all incorporated express companies, and perhaps some other public service corporations. But it is not necessary to its validity that it should include all corporations doing business in the state; for, although class legislation, discriminating against some and favoring others, is prohibited, yet special legislation does not contravene the equality clause of the fourteenth amendment, if, within the sphere of its operation, all persons within its provisions are treated alike in like circumstances and conditions. Hayes *v.* Missouri, 120 U. S. 68, 72, 7 Sup. Ct. 350, 30 L. Ed. 578; Missouri Pacific Railway Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. It is said in Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, 294, 18 Sup. Ct. 594, 42 L. Ed. 1037, that the state may distinguish, select, and classify objects of legislation, and that the power must necessarily have a wide range of discretion. And this is because of the function of legislation, and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It is enough if it is practical, and it is not reviewable unless palpably arbitary. Orient Insurance Co. *v.* Daggs, 172 U. S. 557, 562, 19 Sup. Ct. 281, 43 L. Ed. 552. It was there held that a fire insurance company was not deprived of the equal protection of the laws by a statute applicable to fire insurance companies only, making the entire amount of the policy payable in case of loss, reduced by deprecia-

tion of the property after it was insured. In Minneapolis & St. Louis Railway Co. *v.* Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585, a statute of Iowa making a class of railroad corporations for special legislation was sustained. There the statute imposed double damages for stock killed or injured at a point on the road where the corporation had a right to build a fence, but had not. In Missouri Pacific Railway Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, a statute of Kansas was sustained that abrogated the fellow-servant doctrine only as to railroad companies organized or doing business in the state. While these cases may not be precedents for the case in hand, they are analogous examples of the application of the rule of classification, which is that you must differentiate before you can classify, for otherwise you have only arbitrary selection, which is no ground for classification. But the Paul Case is a precedent here, for there the valid part of the statute applied to railroad corporations only, and they alone were classified for the purpose of making them pay in certain circumstances, regardless of contract. Here the classification is made for substantially the same purpose, and is broader than the classification there, for it includes more than railroad corporations; and, even if it includes more than it should, which we do not intimate, the bad would not vitiate the good, as it did not in the Paul Case. In this connection we are referred to the Railroad Tax Cases (C. C.) 13 Fed. 722. There the taxes sought to be collected were held invalid because of the discriminatory character of their assessment, which the court said was palpably and grossly unjust, and entirely disregarded the rule of equality, and uniformity. The judgment was affirmed above on another ground, and the question on which the case turned below was not considered. Santa Clara County *v.* Southern Pacific Ry. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118. But extreme cases do not prove the rule, and the case as put below is too extreme to be of aid here. But it is objected that the act cannot operate alike on all within its provisions, for it includes foreign corporations doing business in this state, and, as the Legislature cannot amend their charters, they are not subject to its control in this behalf. True, the Legislature cannot amend the charters of foreign corporations; but this court has recently held that foreign corporations doing business here are as amendable to our laws as to business done here as are domestic corporations. In re Consolidated Rendering Co., 80 Vt. 55, 78, 66 Atl. 790. See, also, Cook *v.* Howland and Bacon, 74 Vt. 393, 52 Atl. 973, 59, L. R. A. 338, 93 Am. St. Rep. 912. This precise question was ruled in Dayton Iron Co. *v.* Barton, 183 U. S. 23, 22 Sup. Ct. 5, 46 L. Ed. 61. There the plaintiff in error undertook to defend on the ground of being a foreign corporation. The case arose under the Tennessee store order act that had just been held valid as

to domestic corporations in Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, above referred to. But the court said that, as the act was valid as to domestic corporations, it was valid as to foreign corporations, whose right to do business in the state might be deemed subject to the condition of obeying the regulations prescribed in the legislation of the state.

It is also objected that the act is invalid because it restricts the rights of the defendant's employees to contract with it. But the restriction of their rights is not direct, but results from the restriction of the defendant's rights; and, as that restriction is good as to the defendant, the rights of its employees are not thereby infringed, for they have no right to demand greater liberty for the defendant in order that their liberty may be enlarged. State v. Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856, 864.

It is also objected that the act infringes the rights of the defendant's stockholders. We quite agree with what M. Justice Field said below in the Railroad Tax Cases, that, when it is necessary for the protection of contract or property rights, the courts will look through the artificial name and entity of the corporation to the persons who compose it, and protect them, though the process be in its name; and with what Judge Sawyer said in the same cases, that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators. But their property rights are no more absolute than are the property rights of others, but are as subject to modification as theirs. All men can modify their property rights by contract, but no man can bargain away his right to contract at all concerning property, for that right is unalienable. Now, the defendant's stockholders did modify their property rights in the corporation by becoming stockholders therein, for thereby they must be taken to have assented to any and all amendments of the charter that come within the reserved power; and as the act in question comes within that power, and amends the charter as far as it is inconsistent with it, and to that extent modifies property rights under it, they must be taken to have assented to that modification also. Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 21 L. Ed. 204. But the defendant says that in many of the states acts on this and kindred subjects have been passed, and have always been held unconstitutional as depriving both the employer and the employed of the right to contract; and refers to divers police power cases in support of the claim. Although we do not put this case on the ground of the police power, yet, as that power and the power here reserved are alike limited to the requirements of the public good, those cases may properly be considered, as they are illustrations of the application of the principle involved. On the subject of eight hour laws, refer-

ence is made to Low *v.* Rees Printing Co., 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670, and to Richie *v.* People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315. The Nebraska statute was that a day's work for all classes of mechanics, servants, and laborers, except those engaged in farm and domestic labor, should not exceed eight hours. The Illinois statute was that no female should be employed in a factory more than 8 hours in any one day, nor more than 48 hours in any one week. It was held in both of those cases that the statutes did not come within the police power, and were unconstitutional as depriving both the employer and the employee of the right to contract. But these cases are no warrant for saying that in no circumstances can the hours for a day's work be limited; for in Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, a statute limiting the employment of workmen in all underground mines and workings, and in smelting and other plants for reducing or refining ores or metals, to eight hours a day, except in certain emergencies, was held a valid exercise of the police power, because the kind of employment and the character of the employed in that kind of labor was such as to make it reasonable and proper for the state to interfere in order to protect them from being constrained by the rules of the proprietors in regard to labor. That case is referred to approvingly in Lockner *v.* New York, 198 U. S. 45, 54, 25 Sup. Ct. 539, 49 L. Ed. 937, in which a statute limiting hours of work in bakeries was held not to come within the police power, as there was no reasonable ground for the classification. Reference is made to cases holding that store orders and the like cannot, by statute, be made payable in money; and to cases holding that the relations between employer and employee in the business of manufacturing and mining cannot be regulated by statute. But most of those cases refer to matters held to be purely of private concern, and not at all of public concern. Thus, in State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863, the question arose under an act "to secure to operatives and laborers engaged in and about mines, manufactories of iron and steel, and all other manufactories, the payment of their wages at regular intervals, and in lawful money of the United States." The court stated the question to be whether the Legislature could limit or forbid the right of contract between persons under no mental, corporal, or other disability, when the subject of the contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties themselves. So, in Millett *v.* People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 689, a statute providing for weighing coal at mines as a basis for computing wages for mining it, and declaring null and void all contracts for mining it in which the weighing provided for by the statute was dispensed with, was held unconstitutional, be-

cause not a matter of public concern. The court said that the public is not compelled to resort to mine owners any more than it is to resort to the owners of any other of the ordinary necessities or conveniences of life that form a part of the commerce of the country. And that the owner of a coal mine is under no obligation to obtain a license from any public authority, therefore exercises no franchise when he works his mine. In Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492, a law singling out persons, corporations, and associations engaged in mining and manufacturing, and depriving them of the right to contract as persons, corporations, and associations engaged in other business might lawfully do, was held unconstitutional. So in Ramsey *v.* People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853, an act for the weighing in gross of coal hoisted from mines was held unconstitutional for the same reason. State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, much relied upon by the defendant was a store order case against the members of a firm of coal miners. The law was held unconstitutional, but the court expressly said that the defendants in operating their coal mines were not pursuing a public business, and had not in any way devoted their property to a public use, and that therefore the cases of Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77, and Budd *v.* New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247 were not in conflict with its decision. Those were warehouse cases, in which it is held that, when a person engages in the warehouse business, he subjects himself to legislative control concerning it, as he thereby devotes his property to a public use.

The defendant refers to Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. Rep. 206, in which a special act "to provide for the weekly payment of wages by corporations," but which did not include all corporations in the state, nor properly discriminate between those that it did include and those that it did not, was held void for that reason, but more especially because, although the general corporation act provided that the Legislature should, at all times, have power to prescribe such regulations and provisions as it might deem advisable, which should be binding on all corporations formed thereunder, yet as the Constitution of the state required, by manifest intendment, not only that corporations should be created, but that amendments to charters of those existing should be by general laws, applicable alike to all occupying like circumstances and existing under the same conditions, it necessarily followed that special acts, applying to particular corporations only, and not to the general body of corporations created under the general act, would fall within the prohibition of the Constitution. In Republican Iron & Steel Co. *v.* State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136, a weekly payment law was held unconstitutional as not within the police power. But the case was treated as not involving a matter of

public interest. The court stated the question to be whether "the arbitrary denial of the right to exchange money for labor—one class of property for another—in matters which affect no public interest, is an unwarrantable interference with the right of contract, and a depriving of the individual of liberty and property without due process of law. Johnson *v.* Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17, is in point for the defendant, for the case was not put on the ground that it involved no matter of public interest, whereas, as we have seen, most of the cases referred to by defendant are put on that ground, which impairs their value in this case, which does involve matter of public concern. And, besides, some of those cases are more or less opposed to Knoxville Iron Co. *v.* Hardison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, above referred to. On the other hand, in some of the states this kind of legislation is sustained, as within the police power, or as authorized by reserved power to amend corporate charters. Among such cases may be cited Shaffer *v.* Union, etc., Co., 55 Md. 74; State *v.* Brown & Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344.

We hold, therefore, that the act in question does not deprive the defendant, nor the persons that compose it, of liberty nor property without due process of law; nor deny to them the equal protection of the laws; nor infringe any of their property rights declared by the Constitution of the state.

Judgment affirmed.

STROUD *v.* COLUMBIA, N. & L. R. CO.

(Supreme Court of South Carolina, March 30, 1908.)

[60 S. E. Rep. 963.]

Evidence—Declarations of Agent.*—The declaration of the agent of two railroads, in charge of their yards and business at a certain place, made on the morning after a fire claimed to have been set by a locomotive from such yard, that the engine which went by there at that time, belonged to a certain one of such companies, is admissible against it; it touching matters within the scope of his authority, and being an admission of a fact, and not of a liability.

Trial—Statement of Judge—Charge on Facts.—The statement of the judge, in the course of the trial in an action for a fire alleged to have been set by defendant's locomotive, relative to the testimony as to a declaration of the joint agent of defendant and another railroad company, in charge of their yards from which the engine came, that the engine which passed the place of the fire at the time thereof belonged to defendant, that the judge did not know how any one was to find out who the engine belonged to, if such agent did not know, is not a charge on the facts.

Appeal from Common Pleas Circuit Court of Laurens County; R. C. Watts, Judge.

Action by Emma G. Stroud against the Columbia, Newberry & Laurens Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

W. R. Richey and *Ferguson & Featherstone,* for appellant.
Dial & Todd and *Wm. H. Lyles,* for respondent.

POPE. C. J. Emma G. Stroud brought her action in the court of common pleas for Laurens county against the Columbia, Newberry & Laurens Railroad Company, alleging as her cause of action that the sparks of an engine of the defendant from one of its trains had ignited the dwelling house wherein the plaintiff had about $1,600 worth of property, and that the fire so communicated destroyed the same. The defendant company by its answer admitted its incorporation as claimed in the complaint, but denied the other facts therein stated. The action came on to be heard in the court of common pleas in May, 1907, before Judge Watts and a jury. After hearing the plaintiff's testimony, the defendant

*For the authorities in this series on the question whether the admission of agents or employees are admissible as evidence for plaintiff in action against their respective principal or master, see first foot-note appended to Robinson *v.* Old Colony St. Ry. Co. (Mass.), 21 R. R. R. 860, 44 Am. & Eng. R. Cas., N. S., 860, where all those preceding it are collected.

declining to offer any, and the charge of his honor, the jury returned a verdict in favor of the plaintiff for $700. After judgment the defendant appealed, alleging error on the part of the circuit judge in admitting certain testimony, and also error in refusing defendant's motion for a new trial. We will now notice the grounds of appeal in the order presented.

1. "Because the presiding judge erred, it is respectfully submitted, in allowing the witness W. R. Richey, over defendant's objection, to testify to a conversation by witness with C. H. Gasque, agent of the defendant company, on the morning after the fire, to the effect that an engine belonging to the defendant company had run up the Greenville road, or up to the power house or furniture factory, that night, throwing out many sparks; the error being that such statement or declaration of C. H. Gasque was not a part of the *res gestæ,* and not within the scope of his agency or authority, which was binding upon the defendant, and was hearsay, and his honor should have so held."

We should carefully notice the preliminary testimony, for thereby it is made to appear that C. H. Gasque was the agent of both the Columbia, Newberry & Laurens Railroad Company and also of the Charleston & Western Carolina Railroad Company, in the city of Laurens, S. C., and as such agent had charge of the yards and everything down there of the said two railroads. The defendant on cross-examination developed by testimony that Mr. Gasque is the depot agent of the two railroads and looked after everything down there. Mr. Gasque, as said agent, was asked by Mr. W. R. Richey what engine passed from the joint depot up the Greenville branch on the night of October 20th at about 9 o'clock, and he replied that it was the engine of the Columbia, Newberry & Laurens Railroad Company. The exception here alleges error of the circuit judge in allowing a statement by Mr. Richey of what admission Mr. Gasque made. The defendant insists that the witness should not have been allowed to testify as to the admission of Mr. Gasque, as agent of the defendant railroad, because it is not made to appear that he was present when the engine left the depot yard on the night of the 20th of October, 1905, but made this admission the next morning. The circuit judge held that it would be difficult to ascertain the fact as to the ownership of the engine in question if the agent of the railroad, who had charge of the yard from which it was operated, could not tell about the thing. There was no effort made to ascertain anything about the engine in its passage from the depot past the residence destroyed by the fire; but the admissions were confined to the ownership of the engine and that such engine did pass on the railroad alongside of the burnt building. It is true that the question presented by Mr. Richey to Mr. Gasque contained a reference to the sparks flying from the engine as it passed along; but that admission was not

important, because it was abundantly testified that the engine that passed up about 9 o'clock on the night of the 20th emitted sparks very freely. The importance of these admissions of Mr. Gasque was the identification of the engine itself. It was nowhere attempted by witnesses that the said engine actually set fire to the house. Any conclusion in that regard was left to the jury as an inference. It must be remembered that this was a corporation, and could only speak through agents; and where such agent has control of the depot, and yards around the same, he was in position to represent the railroad company, so that any admissions such agent made touching engines owned by his principal and operating within the territorial limits of his agency would bind his principal.

The declaration of Mr. Gasque to Mr. Richey relating to the engine of the defendant, so far as its identification and location were concerned, were within the scope of Mr. Gasque's agency. As was said in Railroad *v.* Blake, 12 Rich. Law, 634: "The admission of a party may always be given in evidence against him, and the president sufficiently represents his corporation to make his admission evidence against the company." The mere fact that the agency was that of the presidency of a railroad cuts no figure in the discussion. Any agency whose authority enables him to speak for his principal would be sufficient. In Story on Agency, § 3134, it is said: "And here it may be laid down generally that no representations, declarations, or admissions by an agent will bind his principal, except in cases within the scope of the authority confided in him, subject, however, to the same distinction of what notice had already been taken between a limited and a special agent; for, where the acts of the agent would bind the principal, then his representations, declarations, and admissions respecting the subject-matter would also bind him." As has already been stated, the defendant brough out the evidence, establishing the fact that Mr. Gasque had charge of the defendant's depot and depot grounds in which the engine in question was present the night of October 20, 1905. The judge's charge, therefore, was based upon the condition of things. We do not see why such agent should not have represented his principal in stating that the engine in question was the property of the defendant. It seems necessary that there shall be liberality manifested by the courts in the admission of testimony identifying property of the railroads, when such railroads possess full information regarding such property as engines and their operations. Besides, the cases relied upon by the appellant are not in point, because the admissions sought to be proved were admissions of agents made after the accidents and touching matter not in the scope of their agency. We think the circuit judge made no mistake here. This exception is overruled.

2. "Because his honor erred, it is respectfully submitted, in allowing the statement or declaration of G. H. Gasque, agent, over defendant's objection, when the witness W. R. Richey was on the stand, on the ground that such declaration or statement was not an admission of any liability of the road at all, but just an admission of the fact of what engine it was; whereas, his honor should have held that such statement or declaration was an admission of liability, for the reason that it is the only testimony in the case that shows, or tends to show, that the engine that passed by the place where the fire occurred a short while before was an engine of the defendant company, and his honor should have held, that being so, the statement or declaration was not a part of the *res gestæ,* and not within the scope of Mr. Gasque's agency, and was hearsay, and therefore incompetent."

We cannot accept the contention of the appellant of the declaration of Mr. Gasque, as agent of the defendant, admitted any liability to the plaintiff for the fire. It was only an admission of the identity of the ownership of the defendant as to the engine. Therefore we overrule this exception.

3. "Because his honor erred, it is respectfully submitted, in remarking, in the presence of the jury, when the witness W. R. Richey was on the stand, as follows: 'If he does not know, being joint agent, and knowing the yard, and having charge of everything—if he does not know who that engine belonged to, I do not know how anybody is ever to find out'—the error being that this statement was really a charge on the facts, and also prejudicial to the defendant as indicating the leanings of his honor, and thereby creating an impression in the minds of the jury favorable to the plaintiff."

We do not think that the language of the circuit judge used in this exception amounted to anything else than that the admission of C. H. Gasque was to the identification of defendant's engine in question, and that the agents, such as Mr. Gasque, alone could tell to whom the engine belonged. Certainly the language of the circuit judge was not a charge upon the facts, as forbidden by the Constitution of this state, when it forbids any circuit judge to charge upon the facts; nor do we agree with the inference of the appellant that an impression was made upon the jury by such language. This exception is overruled.

4. "Because his honor erred, it is respectfully submitted, in refusing defendant's motion for a new trial on the ground that it was error to allow the witness W. R. Richey to testify to the conversation had by him with C. H. Gasque, agent, the morning after the fire, to the effect that on the night of the fire an engine of the defendant company went up to the power house or furniture factory, on the Greenville branch, and passed by the place of the fire, when such testimony was incompetent, for the reason that it was not a part of the *res gestæ,* and not

within the scope of the agent's authority, and not binding upon defendant, and was hearsay, and his honor should have so held."

As we read the record here, the appellant, while making his motion for a new trial, declined to argue the same in the brief or arguments. This is the reference to a motion for a new trial: "Mr. Dial: We don't care to argue the motion for a new trial; but we think your honor was in error in allowing testimony as to the agency. The Court: I will let the Supreme Court decides that." But, apart from all this, what has already been stated shows that these things are before the court, and no further argument was necessary to the mind of the judge. We concur with him, and overrule this exception.

It is the judgment of this court that the judgment of the circuit court be affirmed.

MILLER *v.* CHICAGO & N. W. RY. CO.

(Supreme Court of South Dakota, April 2, 1907.)

[111 N. W. Rep. 553.]

Railroads—Injury to Animals on Track—Presumption of Negligence—Rebuttal.*—In an action against a railway company for the loss of animals, while trespassing on the right of way 25 rods east of a road crossing, struck by a locomotive backing eastwardly, the presumption of negligence of the company was overcome by evidence that its engine and roadbed were in good condition, and that the conductor, engineer, and fireman were fully competent and did not see the animals.

Same—Failure to Give Statutory Signals—Effect.†—Where plaintiff's animals were struck while trespassing upon defendant's right of way 25 rods east of a highway crossing by a locomotive backing eastwardly, the failure of defendant's employees to give statutory signals on approaching the crossing was insufficient to authorize a verdict for plaintiff; there being no evidence that the accident would have been avoided had the signals been given.

Same—Effect of Rate of Speed.‡—That the locomotive struck plain-

*See foot-notes appended to Atlanta & W. P. R. Co. *v.* Hudson (Ga.), 18 R. R. R. 490, 41 Am. & Eng. R. Cas., N. S., 490.

†See extensive note, 22 Am. & Eng. R. Cas., N. S., 199, et seq.; foot-notes appended to Everett *v.* Great Northern Ry. (Minn.), 23 R. R. R. 259, 46 Am. & Eng. R. Cas., N. S., 259.

‡For the authorities in this series on the question whether the speed of a train may be negligent with respect to animals on or near track, see Chicago, etc., R. Co. *v.* Crose (Ill.), 20 R. R. R. 512, 43 Am. & Eng. R. Cas., N. S., 512; Western Ry. of Alabama *v.* Stone (Ala.), 19 R. R. R. 835, 42 Am. & Eng. R. Cas., N. S., 835 (negligence to

tiff's animals, which were trespassing upon the track, was backing at a high rate of speed, was not evidence of the railway company's negligence.

Evidence—Conclusiveness of Uncontradicted Testimony.§—Where, in an action against a railway company for the loss of animals struck by a locomotive while trespassing upon the track, the conductor, engineer, and fireman testified that they did not see the animals, in the absence of contradictory evidence, the jury could not disregard their testimony.

Appeal from Circuit Court, Codington County.

Action by Joseph Miller against the Chicago & Northwestern Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

R. W. Stewart and *Seward & McFarland,* for appellant.
Case & Shurtleff, for respondent.

CORSON, J. This was an action instituted by the plaintiff to recover from the defendant the value of a mule and pony alleged to have been killed by the negligence of the defendant's servants and employees. Verdict and judgment being in favor of the plaintiff, the defendant appeals.

At the close of plaintiff's evidence, and also at the close of all the evidence, the defendant moved the court to direct a verdict

run train at night so fast that it is impossible to stop it within distance that headlight illuminates track); Central of Georgia Ry. Co. *v.* Duggan (Ga.), 19 R. R. R. 803, 42 Am. & Eng. R. Cas., N. S., 803 (owner of stock killed by train beyond crossing could not recover, although it appeared, in approaching crossing, the engineer did not observe statutory requirements as to checking speed; his failure to do so not having been proximate cause of injury); St. Louis & S. F. Ry. Co. *v.* Carlisle (Ark.), 16 R. R. R. 462, 39 Am. & Eng. R. Cas., N. S., 462; O'Leary *v.* Chicago, etc., Ry. Co. (Iowa), 16 R. R. R. 141, 39 Am. & Eng. R. Cas., N. S., 141; Central of Georgia Ry. Co. *v.* Williams Buggy Co. (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171 (speed, at other points than crossings, is not negligence); Anniston Electric & Gas Co. *v.* Hewitt (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312 (duty of motorman with respect to speed); note, 14 Am. & Eng. R. Cas., N. S., 23 (speed of train as negligence, in stock killing cases); note, 5 Am. & Eng. R. Cas., N. S., 188 (speed of train in cities and villages); Ford *v.* St. Louis, etc., Ry. Co. (Ark.), 15 Am. & Eng. R. Cas., N. S., 142; Southern Ry. Co. *v.* Wood (Ky.), 15 Am. & Eng. R. Cas., N. S., 570 (speed in violation of ordinance); Georgia R. & B. Co. *v.* Clary (Ga.), 11 Am. & Eng. R. Cas., N. S., 856 (stock killed beyond crossing); Alabama Midland Ry. Co. *v.* McGill (Ala.), 14 Am. & Eng. R. Cas., N. S., 20.

§For the authorities in this series on the subject of credibility of railroad employees as witnesses in actions against their respective companies, see foot-notes appended to Central of Georgia Ry. Co. *v.* Bagley (Ga.), 15 R. R. R. 172, 38 Am. & Eng. R. Cas., N. S., 172; foot-notes appended to Wabash R. Co. *v.* Billings (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203.

in its favor on the grounds, among others, that the evidence was insufficient to sustain a verdict in favor of the plaintiff, and that the plaintiff was guilty of contributory negligence. This motion was denied, and the ruling of the court denying the motion was duly excepted to. It is contended by the appellant that the court erred in this ruling, and we are of the opinion that the appellant is right in its contention. It is disclosed by the record that the following facts were undisputed: That early in the evening of the 13th of February, 1903, one of defendant's locomotives with tender attached was backing in an eastwardly direction from Watertown to Goodwin for the purpose of pulling into Watertown a disabled passenger train, which was at the latter station; that at a short distance east of Watertown plaintiff's pony and mule were trespassing upon defendant's right of way at a distance of about 25 rods from and east of the nearest highway crossing; that they were struck by the locomotive, and died as a result of the injuries so received; and that no whistle was sounded or bell rung at a point 80 rods from or at any other point before reaching the highway crossing. After the preliminary evidence was introduced by the plaintiff as to the killing of the mule and pony, the presumption of negligence arising from such proof was clearly overcome by the evidence on the part of the defendant that its engine and roadbed were in good condition; that the conductor, engineer, and fireman were fully competent; and that neither of said persons saw the animals which were struck and injured. The only evidence offered on the part of the plaintiff in rebuttal of defendant's evidence, tending to prove negligence on the part of the employees of the defendant company, was the failure of the defendant's employees to sound the whistle or ring the bell before reaching the highway crossing; that the engine was being run at a high rate of speed, and that it was light enough so that the conductor, engineer, or fireman could have seen the animals several hundred feet away. It is insisted by the respondent that the failure of the defendant's employees to sound the whistle and ring the bell, as provided by the Code, before reaching the highway crossing, constituted such negligence as to authorize the jury to find a verdict in favor of the plaintiff, taken in connection with the high rate of speed at which the engine was being run, but this contention is untenable.

This court had occasion to consider this question in the case of Mankey *v.* Railroad Company, 14 S. D. 468, 85 N. W. 1013, in which this court held that evidence of a failure to sound the whistle or ring the bell before reaching a highway crossing did not of itself constitute evidence sufficient to authorize a jury to find a verdict that the killing resulted from such failure, where the animal killed was trespassing upon defendant's right of way at a point between the whistling post and the highway crossing.

In other words, the mere fact that the employees of the defendant failed to comply with the requirements of the statute did not of itself constitute sufficient evidence of negligence to authorize the jury to find that the failure to so comply was such negligence as to render the defendant liable, in the absence of proof that such failure to comply with the statute in some way resulted in the killing of the animals. And this court also had under consideration a similar question in the case of Dougherty v. Railroad Company (S. D.) 104 N. W. 672. In that case the animal was killed while crossing the track on a public highway, and there was evidence tending to show that the killing resulted from the negligence of the defendant's employees in failing to sound the whistle or ring the bell, as required by the statute. The failure on the part of the railroad employees to comply with the statute is so fully discussed in those cases that we do not deem it necessary to enter upon a further discussion of the question here. The facts in the case at bar are very analogous to those stated in Mankey *v.* Railroad Company, *supra.* While it is true that the employees of the defendant neglected to sound the whistle or ring the bell, as required by the statute, there was no evidence offered from which a jury could have reasonably inferred that such failure resulted in the killing of the animals. The pony and mule killed were eastwardly from the crossing about 25 or 30 rods, and the evidence does not prove or tend to prove that, had the whistle been sounded or the bell rung, as required by the statute, the accident would have been avoided.

The contention that the high rate of speed at which the engine was run, as claimed by the plaintiff, was under the circumstances of the case, evidence of negligence on the part of the employees of the defendant, for the reason that had the engine been run at a low rate of speed, and the whistle been sounded or the bell rung, the plaintiff might have had time to save his animals from being killed, is also untenable. No law or ordinance has been called to our attention limiting the rate of speed at which an engine may be run, and, in the absence of such a law or ordinance, the company had the right to run its engine at such a rate of speed as it deemed necessary, consistent with the exercise of due care in the running of the same. Assuming, therefore, that the engine was being run at a high rate of speed, and for that reason the plaintiff did not have sufficient time to unhitch his team and bring away his mule and pony from the track, this fact cannot be imputed to the defendant as negligence on its part. The plaintiff knew that his animals were near the track and in danger of being injured by a passing train, which was due at about that time, and his neglect to bring them away from defendant's right of way would indicate that he himself was guilty of contributory negligence in allowing them to re-

main there. He had time to remove them before the engine passed along, had he acted promptly, and his failure to do so was not negligence on the part of the defendant, but his contributory negligence.

The further contention of the respondent that the conductor, engineer, or fireman did see the animals on the track, for the reason that they might have seen them, is mere conjecture, and not supported by the evidence of any facts which tend to contradict their testimony that they did not see the animals. The case at bar is clearly distinguishable from the case of Lighthouse *v.* Railroad Company, 3 S. D. 518, 54 N. W. 320, in which this court sustained the verdict of the jury holding that the engineer did see certain horses upon the track, notwithstanding his positive denial that he did not see them in time to prevent the injury to the animals. It was proven, however, in that case by disinterested witnesses, that the horses were running upon the track ahead of the engine for a distance of about half a mile before they were struck and injured, and the statement of the engineer that he was looking ahead, but did not see the horses on the track in time to prevent the injury, was so improbable that the jury was justified in disregarding his evidence, and the engineer was also contradicted in that case as to other material parts of his testimony. And the case at bar is also clearly distinguishable from Schimke *v.* Railroad Company, 11 S. D. 471, 78 N. W. 951, as in that case there was evidence tending to contradict the statements of the engineer, and was sufficient to require the submission of the case to the jury; and is also distinguishable from the case of Sheldon *v.* Railroad Company, 6 S. D. 606, 62 N. W. 955, the facts of which are very similar to those in the latter case. In the case at bar, however, there is no evidence contradicting, or tending to contradict, the statements of the conductor or fireman, and, in the absence of such contradicting evidence, the jury was not at liberty to disregard their statements.

The defendant was therefore entitled to a direction of the verdict in its favor, and the judgment of the circuit court and order denying a new trial are reversed.

CORNOVSKI et ux. *v.* ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, Nov. 27, 1907.)

[106 S. W. Rep. 51.]

Trial—Questions of Law—Uncontradicted Evidence.—Where the evidence is undisputed, all one way, and of such cogency, that but one conclusion can be drawn by a rational mind, or where the thing proves itself, the court may deal with it as a matter of law.

Street Railways—Danger Line.—In an action against a street railway company for running over a four year old child it is not error to assume that, as to her, the curb line of a city street is the danger line in crossing the street.

Same—Instruction—Constructive Line of Danger.—An instruction that if the motorman in charge of a car saw, or by keeping a vigilant watch would have seen, plaintiff's intestate crossing the street, and in a position of danger, etc., did not assume that the curb line was the danger line.

Same—Sufficiency—Proximate Cause.—An instruction that if defendant's motorman saw, or by keeping a vigilant watch would have seen, the decedent crossing the street, and in a position of danger, and by stopping the car within the shortest time and space practicable, etc., with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of the car and persons thereon, could have avoided running over and killing decedent, and neglected to do so, plaintiffs are entitled to recover, etc., in the absence of contributory negligence, is sufficient to submit to the jury the question of casual connection between the negligence of defendant and the death of the child, though it did not use the expression "proximate cause."

Trial—Cure of Instructions.—If the instruction was not sufficient to correctly submit the question of the proximate cause of the injury, it was cured by other instructions that, before the jury could find for plaintiff, they must find that the death of the child was actually caused by defendant in the manner submitted to them by the instructions; that, if her death was not actually caused by such specified negligence, plaintiffs had no case, even if the child was killed by being run over by defendant's car, and that they could not infer negligence from the fact of the child's injury by the car, and that, though the burden was on defendant to establish plaintiff's contributory negligence, it did not relieve plaintiff of the burden of proving that the injury and death of the child were solely caused by defendant's negligence.

Cornovski *v.* St. Louis Transit Co

Negligence—Imputed Negligence—Instructions—Circumstances in Life.*—In an action against a street railway company for running over plaintiff's four year old child, it was not error to instruct that, in determining whether plaintiffs by their negligence in the custody and care of the child contributed to her injury and death, the jury was to consider whether or not the jury was to consider whether or not they exercised that degree of care, caution, and watchfulness over the child, which was reasonable and proper for parents in their circumstances of life, as shown by the evidence.

Appeal—Harmless Error—Instructions.—Where the evidence as "to circumstances in life," mentioned in an instruction as to imputing the negligence of parents to a child run over and killed by a street car, went no further than to show the employment and duties of father and mother at the immediate time the child escaped into the street and was injured, and there was no proof as to plaintiffs' financial condition in life as such, the instruction, if erroneous, would not be prejudicial.

Graves, J., dissents as to the propriety of the instruction permitting consideration of plaintiffs' circumstances in life. Valliant, P. J., and Woodson, J., dissent from the criticism of the Levin and Czezewzka Cases.

Appeal from Circuit Court, St. Charles County; H. W. Johnson, Judge.

Action by Hymen Cornovski and wife against the St. Louis Transit Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Boyle & Priest, Edward T. Miller, and *T. E. Francis,* for appellant.

Wm. L. Bohnenkamp and *Wm. R. Gentry,* for respondents.

LAMM, J. Plaintiffs, husband and wife, the parents of Esther Cornovski (the said Esther having been run over and killed by one of defendant's cars on the evening of the 18th of March, 1903, in the city of St. Louis), sued defendant for statutory damages as for her wrongful death, and recovered a judgment for $5,000. Perfecting an appeal on due and seasonable steps, defendant brings the cause here for review.

One of the charges of negligence related to a negligent failure to put in motion and drop the fender on the car, as provided in a city ordinance. This charge was taken from the jury by instruction. Another charge of negligence was a failure to sound the

* See note, 10 Am. & Eng. R. Cas., U. S., 883; Mattson *v.* Minnesota & N. W. R. Co. (Minn.), 21 R. R. R. 109, 44 Am. & Eng. R. Cas., N. S., 109; foot-notes appended to Garner *v.* Trumbull (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 589; Jackson *v.* Kansas City, etc., R. Co. (Mo.), 19 Am. & Eng. R. Cas., N. S., 99.

gong or give any other warning to the deceased of the danger from an approaching car. That charge also was taken from the jury by instruction. Esther was a minor of tender years. She was killed on Eleventh street, and the ground of negligence charged in the petition and put to the jury was a violation of an ordinance of the city of St. Louis known as the "Vigilant Watch Ordinance," in that defendant's motorman "negligently and carelessly failed to keep a vigilant watch for all persons on foot, and especially the daughter of these plaintiffs, moving towards the track or upon the track, and that said motorman failed on the first appearance of danger to the daughter of these plaintiffs to stop the said car within the shortest time and space possible." The defense interposed was a general denial and a plea of contributory negligence, viz., that the child's death was caused by the negligence of her parents, in that she was of immature years, and they allowed her to be upon a street after dark where they knew street cars were being operated, unaccompanied by a person of mature years. Defendant demurred to the evidence at the close of plaintiffs' case and again at the close of the whole case. These demurrers were overruled and defendant saved an exception, but does not assign error here on said rulings.

The case is presented to us on the theory that plaintiffs made a case for the jury, and the errors assigned pertain to the way it was put to the jury. In this condition of things, the determination of the case may proceed understandingly by fetching a small compass on the facts. Thus: Esther was two or three months short of four years old. She was struck and literally cut to pieces on the evening of March 11, 1903, between half-past 6 and 7 o'clock by a street car manned by defendant's employees. Defendant had a single track on Eleventh street, used for southbound cars. Plaintiff, Hyman Cornovski, kept a grocery store on the east side of that street—the wife helping in the store. They lived back of the store, at least they ate there, and possibly had their living and sleeping rooms over the store. There was a little, narrow yard, so called by courtesy, between the cooking and eating apartments and the store proper, or back of all of them, and this yard was connected with Eleventh street by a passageway shut off from the street by a gate. On the evening in question some of the plaintiffs' children had been upstairs taking a music lesson. The music teacher, passing out on the street, saw Esther sitting quietly on a box in front, and the child threw her a kiss. It seems she had been in the kitchen with her mother, who had just washed her face, combed her hair, and given her her supper, and then told her to tell the other children to come to the table. The mother, busy and preoccupied with her evening household cares, for the instant forgot the child, who went out the back door and into said yard. Soon the mother, hearing screaming in the street, ran out and learned her daughter was dead.

She testified the family were new and strange on the street; Esther wasn't used to it; they had moved there in January past, in the winter time; and that when she played out doors it was always in the little yard. The mother did not know she had gone on the street. The father said, in substance, that he was busy in the store waiting on customers, and vending his wares; that glancing out of the front window or door he saw Esther sitting on a little box, hard by the door, a few minutes before she was killed. This was the last time he ever saw her alive, and then she was alone. He did not see her in the street that evening, and never saw her cross it before at any time. It appears, as of course, that both parents knew that defendant's cars ran on a schedule of short intervals on Eleventh street. There was a fire-engine house opposite, or nearly opposite, Cornovski's place. Its door was open, the evening was mild and bright. What lured the child across the street is unknown; but she did cross it, and was seen on the west side by the engine house, going along the sidewalk with another girl aged about seven—a neighbor's. From the west curb to the rail of defendant's track is 12 feet. Presently these children left the west sidewalk and ran from the curb, somewhat diagonally, east toward Esther's home. The elder girl, being in advance, crossed the track and escaped the oncoming car, but Esther was caught and killed at the west rail.

On plaintiffs' side it was shown that, when the children left the curb and passed towards the track, the car was about 60 feet away. Contra, there was evidence on defendant's side that it was only about 12 or 15 feet away. No witness placed the speed of the car in excess of seven miles an hour. There was a very small grade, if any, at the place of accident—a very slight dip down. The car was equipped with an "ordinary goose neck hand brake, an ordinary controller, and an ordinary reverse." The street was in good condition, the track dry, and in this condition of track, grade, and appliances, the car, according to plaintiffs' experts, could have been stopped within 15 feet. According to defendant's experts, it could not have been stopped within less than 40 or 45 feet. On plaintiffs' side there was evidence tending to show that for a little while before the child was struck, and up to the very instant, the motorman was inattentive to his duties. He was at his post, possibly, but did not have a hand on the brake or controller, was not looking in front, and did not see Esther at all. One of plaintiffs' witnesses, riding on the front platform with the motorman, said that employee was looking back "as if he was looking back to see something just before the accident happened." Then there came a halloo or a scream, and the motorman "made a sudden dash for the brage." As he grabbed the brake, he asked the witness "what was the matter, what was the trouble, and wanted to know if he had run over somebody, was somebody hurt?" Two of plaintiffs' eyewitnesses

said the motorman seemed to be looking sideways towards the enginehouse, west, and not to the front or towards Esther. Contra, on defendant's side it was shown that the motorman was at his post of duty, was keeping a vigilant watch ahead of him at the time, and that at the instant the children left the sidewalk he saw them and at once applied the brake, reversed his power, and did everything possible to stop without avail. There was undisputed evidence that the immediate place was "thickly populated, and of a pleasant evening there were always large crowds of children around there." On that particular evening it was as usual.

Plaintiffs were allowed three instructions (number 1 and number 3 being excepted to), viz.: (1) "If the jury find from the evidence that on the 18th day of March, 1903, the defendant was using the car mentioned in the evidence; and if the jury further find from the evidence that on said date the plaintiff's were husband and wife and were the father and mother of the child, Esther Cornovski, and that said Esther was then a minor and unmarried; and if the jury further find from the evidence that at said time Eleventh street, at the point mentioned in the evidence, was an open public street in the city of St. Louis; and if the jury further find from the evidence that on said day, while the plaintiffs' said child, Esther, was attempting to cross Eleventh street, she was run over and killed by the car mentioned in the evidence, which was being operated by the defendant, St. Louis Transit Company, through its motorman; and if the jury further find from the evidence that the said motorman in charge of said car saw, or by keeping a vigilant watch, would have seen the plaintiffs' said child, Esther, crossing said street, and in position of danger of being struck by said car, and by stopping said car within the shortest time and space practicable, under the circumstances, with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of said car and of the persons on said car, could have avoided running over and killing said child, and neglected to do so—then plaintiffs are entitled to recover of the defendant the sum of five thousand dollars ($5,000), unless you further find from the evidence that the plaintiffs, or either of them, were guilty of negligence in the care and custody of their child, which contributed to cause the death of said child." (2) "By the term 'ordinary care,' as used in these instructions, is meant such care as would be exercised by a reasonably prudent person under the same or similar circumstances." (3) "The court instructs the jury that in determining whether or not the plaintiffs contributed by their negligence in the custody and care of their child, Esther, to her injury and death, you are to consider whether or not they exercised that degree of care, caution, and watchfulness over their said child, Esther, which was reasonable and proper for parents in their cir-

cumstances in life, as shown by the evidence. You are further instructed that the burden of proving contributory negligence on the part of the plaintiffs rests upon the defendant."

The defendant prayed twelve instructions—all of them allowed. Of that series, No. 4, No. 5, and No. 6 bear somewhat on the contentions made here. They run as follows: (4) "The mere fact, if true, that the said Esther Cornovski was injured and killed by a car of defendant gives plaintiffs no right to sue defendant and recover damages. Before, under any circumstances, plaintiffs are entitled to a verdict, you must find from the evidence that the injuries and death of the said Esther were actually caused by the negligence of defendant in the manner submitted to your consideration in these instructions. If her injury and death were not actually caused by such specified negligence, then plaintiffs have no case and cannot recover, even if the said Esther was injured and killed by being struck or run over by defendant's car. But even if you find that the said Esther was injured and killed by such negligence, still plaintiffs cannot recover if, by their own act or conduct, as specified in instruction No. 1, given on behalf of defendant, they negligently contributed to her injury and death." (5) "The court instructs the jury that they cannot infer negligence from the fact that the plaintiffs' child was injured by the defendant's car, but that the negligence charged against defendant is a fact which must be proved, and the burden of proving same by the greater weight of the evidence is upon the plaintiffs." (6) "While the burden of proof is upon the defendant to establish the contributory negligence of plaintiffs, yet this does not relieve plaintiffs of the burden of proving that the injury and death of the said Esther were solely caused by negligence of defendant, as set out in other instructions. The burden of proving that fact rests upon the plaintiffs, as set out in other instructions, either in whole or in part, caused, or directly contributed to cause, the injury and death of the said Esther, then your verdict must be for the defendant."

On the foregoing record, defendant assigns error, viz.: Error in giving instruction 1, for that (a) it assumes the child was in a position of danger the moment she started across the street, instead of leaving that question to the jury to determine as a fact, for that (b) the instruction did not require the jury to find that defendant's negligence was the proximate cause of the injury. And error in instruction 3, in that (c) it directed the jury in determining the issue of contributory negligence to take into consideration plaintiffs' "circumstances in life." And (d) if that were proper, then there was no evidence tending to show what plaintiff's circumstances in life were; ergo, there was no testimony in support of the instruction. Of these seriatim.

1. Assuming for the nonce that the instruction itself assumed the curb line was the danger line, then, to say whether an assump-

tion is erroneous, the state of the proof in the identical case-made is a prime prerequisite to correct judgment. Where the evidence is undisputed, is one way, and of such brand of cogency that but one just conclusion can be drawn from it by any rational mind, or where the thing proves itself, the court may deal with it as a matter of law. Why, indeed, frame an issue for a jury in a practical tribunal, administering the laws of a practical people in a practical way, requiring that jury to find and solemnly determine a fact not a fit subject of controversy, and which can be determined only one way by all just men? If Esther had been an adult in the possession of mature judgment, or had passed the years of infancy, and was arriving at years of judgment and sense, then, unless the motorman saw she was bent on crossing the track and was oblivious to her danger, it would have been error to have assumed that she was in danger from the very time she left the curb until she reached the track. Where the danger line would lie (with reference to the running of street cars) for an adult, or for one possessed of some years and some discretion, in crossing the street, might very well be a matter of difference between good average men, and therefore, a question for the jury. Now, the sidewalk of a street is for foot travelers —children and grown. Between the curbs is for traffic; there, horses, wagons, vans, carts, and cars pass to and fro, and the wheels of commerce go clattering and roaring round and round in a confusion as bewildering as the wheels in Ezekeil's vision Our very instincts teach us that when a four year old child, unattended, leaves the curb of a sidewalk—that is, leaves a place of comparative safety—and heads across a street devoted to traffic in a great city, with a car track 12 feet away on which a car is approaching (as here), the little one as surely and instantaneously plunges into danger, as that the square of the hypothenuse of a right angled triangle equals the sum of the squares of the other two sides, i. e., it is axiomatic. Danger to the child and duty on the motorman's part began the instant such a child left the sidewalk bound headlong for the track. Cytron *v.* Transit Co. (not yet officially reported) 104 S. W., loc. cit 117. See, also, Livingston *v.* Railroad, 170 Mo. 452, 1 S. W. 136. The finding of twelve men in the box on that question under this record would not instruct any court, or subserve any purpose of the law. And this is so because the thing speaks for itself, and in speaking it says, as well before as after a jury's finding, that as for Esther the curb was the danger line. It would be no more sensible to put that question to the jury than it would be to put to them to find where the danger line in firing a barn was chalked out, when a burning brand was cast into a mow of tow, or where such line lies when an infant is in a den of asps or rattlesnakes. If, then, the learned counsel for defendant are right in their contention that plaintiffs' instruction No. 1 assumes

Esther Cornovski entered the danger zone when she left the curb and ran towards defendant's track, there was no error. However, that contention is not right. The instruction assailed did not assume the curb was the danger line, and the entire street the danger zone. It says nothing about "curb" but refers the jury generally to the child's "crossing said street and in a position of danger of being struck by said car." That is, wherever the danger line lay, the jury should locate it and consider it. Hence, it is not open to the criticism leveled at it. The point is ruled against defendant.

2. It is urged that vice lurks in instruction 1 because it did not directly put it to the jury to find that the negligence of defendant was the "proximate cause" of the injury to plaintiffs' child. It is true the instruction does not use the phrase "proximate cause." That phrase is one of a large and learned terminology, and it involves a refinement in mental process and reasoning not of the essence of a good instruction, provided the thing to be got at is put to the jury in another way and within easy, everyday comprehension. The phrase "proximate cause" is not an everyday or heartstone phrase. The average men who compose the body of the county, from which jurors are drawn, daily and shrewdly reason well from cause to effect, and doubtless not one in a thousand of them in so reasoning use that formidable and bookish phrase. They use other expressions from their mother tongue meaning the same thing.

It is elementary that there must be a causal connection between the negligence and the injury in order for the negligence to be actionable. Harper *v.* Terminal Co., 187 Mo. 575, 86 S. W. 99. Here the jury were told that if they found the evidence the motorman saw, or by keeping a vigilant watch would have seen, Esther crossing said street and in a position of danger of being struck by said car, and by stopping said car within the shortest time and space practicable, under the circumstances; with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of said car and of the persons on said car, could have avoided running over and killing said child, and neglected to do so, then plaintiffs are entitled to recover, unless they found plaintiffs were guilty of negligence in the care and custody of the child directly contributing to cause its death.

Now, the case at bar is one in which it is not contended the deceased child was of age to be guilty of contributory negligence. Holmes *v.* Railroad, 190 Mo., loc. cit. 106, 88 S. W. 623. That, then, is out of the case.

Nor is it one in which there is an iota of testimony that any other cause produced death except the act of the motorman in running his car over the child. With so much assumed, the issue to be tried is separable into three elements: First, the contributory negligence of the parents. That was put to the jury fairly

by instruction 1, and by other instructions for defendant. Second, the negligence of defendant. There was ample evidence to show that, the question was submitted properly. Third, the causal connection between the negligence and the death. As to this element, the jury were told, in substance, that if defendant's motorman could have avoided killing the child by the use of ordinary care, after it was seen or might have been seen in peril, and neglected to exercise such care, then defendant is liable. It might have been better to have inserted in the instruction some such phrase, totidem verbis, is used, yet in fair logical intendment ure, if any, to exercise ordinary care directly caused the injury and death of Esther," or "was the proximate cause of her injury and death, then the jury should find," etc. But though no such phrase, totidem verbis, is used, yet in fair logical intendment the instruction must be held sufficient to put to the jury the causal connection between the negligence of defendant and the death of the child—i. e., that one was caused by the other. Thus, if A. kill B., and it is once determined that he could have avoided killing B. by the exercise of due care, it would seem that, in the domain of reason and in ultimate analysis, the connection is made between the killing and the failure to exercise due care; that the two things bore the relation of cause and effect. An instruction in similar form has been sustained by the reasoning of this court. For example: Rapp *v.* Transit Co., 190 Mo., loc. cit. 154 et seq., 88 S. W. 865; Hilz *v.* Railroad, 101 Mo., loc. cit. 40 et seq., 13 S. W. 946. In the latter case (page 54 of 101 Mo., page 951 of 13 S. W.) it was held that where the failure to discover decedent was the result of the omission of the measure of duty required by the law, and where a due observance of the duty would have avoided the injury by the use of reasonable care, then such omission and want of reasonable care are under the law held the proximate cause of the injury.

But we need not allow the foregoing reasons to be alone determinative of the point. In this case the doctrine of aider may be invoked, for if it be admitted there be doubt as to whether plaintiffs' instruction squarely put the causal connection to the jury, or if that causal connection was put feebly or obscurely or only impliedly to them, yet defendant's own instructions turned on full light, cleared up all obscurity, and removed all doubt, if any existed on that question. By defendant's instruction number 4 the jury were told that, before they found for plaintiffs, they must find that the injuries and death of Esther were actually caused by defendant in the manner submitted to them by the instructions; and that if her death was not actually caused by such specified negligence then plaintiffs have no case, even if Esther was killed by being run over by defendant's car. By instruction 5 they were told that they could not infer negligence from the fact that the child was injured by the car. By instruction 6

they were told that though the burden was upon defendant to establish contributory negligence of plaintiffs yet that did not relieve plaintiffs of the burden of proving that the injury and death of Esther were solely caused by the negligence of defendant. The same point was under exposition in Deschner *v.* Railroad, 200 Mo., loc. cit. 332 et seq., 98 S. W. 737, and was ruled as herein indicated. The instruction must be read as one body of law, and the assignment of error is, therefore, disallowed.

3. It is next argued that plaintiffs' instruction number 3 was erroneous in form, and unsupported by the testimony. That instruction follows approved precedents. Czezewzka *v.* Railroad, 121 Mo. 201, 25 S. W. 911; Levin *v.* Railroad, 140 Mo. 624, 41 S. W. 968. It is of the essence of good sense that if an appellate court has got on the wrong track it should get on the right track—the sooner, the better. Nevertheless, it is no light thing for a court to have persuaded litigants into the belief that a certain instruction announces a correct rule of law, and is applicable to a given state of facts, then, when that belief has crystalized into action of a concrete case, to face the other way, and destroy a judgment the product of its own teaching.

Much might be said and well said against the use of the phrase "circumstances in life" in measuring the duty of a parent to a child where the question hinges on the parents' contributory negligence; and appellants counsel have not been amiss or remiss in saying it. At first blush, the use of that phrase seems to involve a question of poverty or riches, of high or low social status, and to invite (or squint at the invitation of) proof of the fact in one case, that the parents are poor and needy, downcast and humble, and in another case that they are opulent and exalted, lolling in the lap of wealth and seated in a high place. Such a field of exploration in a jury trial in a negligence case is full of pitfalls and snares, insidiously appeals to class prejudice, and runs counter to the broad proposition that there is but one rule of law for the high and low, for the rich and the poor. Doubtless the courts would shut the door on such proofs, if offered. Nevertheless, it may be said that those who of necessity are preoccupied with the toil of their own hands to earn their daily bread might not in a given case be guilty of negligence in allowing a little child to escape to the street of a city, when other persons because of other circumstances and conditions might be found by a jury to be remiss in a given case—due care being a care that adjusts itself automatically to the circumstances of the case. Dean *v.* Railroad, 199 Mo, loc. cit. 408, 97 S. W. 910.

Contributory negligence is but negligence with an expletive. Negligence is but the absence of due care. Due care is ordinary care. Ordinary care is defined as the care that would be exercised by a reasonably prudent person under the same or similar circumstances. That definition is a landmark of the law. "The

old way is the safe way," says Chancellor Kent in Manning *v.* The Executors of Manning, 1 Johns. Ch. (N. Y.) *350. "The beaten way is the safest," says Lord Coke (10 Coke, 142). That definition may well be taken as both the old way and the beaten way. To try to improve on it is but to add "wasteful and ridiculous excess"; is but "to gild refined gold, to paint the lily." King John, Act. IV, § 1. If a close case were here, we would be disinclined to follow the Czezewzka and the Levin cases. If such case were here involving a consideration of the phrase "circumstances in life," we would deem it our duty to consider the question of its use open and serious; but in the case at bar its use must be held harmless error, if error at all. Here, there was no proof of plaintiffs' social or financial condition in life, as such. The evidence pictured to the jury the business and surroundings of plaintiffs and their home. In the evidence, the jury were told the facts upon which to base their verdict on the issue of contributory negligence. The employment and duties of the father and mother at the immediate time the child escaped to the street were before the jury. The evidence went no further than this, we think was entitled to go as far as it did; and it would be audacious to say that the phrase "circumstances in life" pruduced any effect on their verdict

There being no error affecting the merits, the judgment is affirmed.

VALLIANT, P. J., and WOODSON, J., concur in the result and in all of the opinion except the criticism of the Levin Case and the Czezewzka Case. GRAVES, J., concurs in the result and in all of the opinion except paragraph 3. He holds that the instruction discussed in that paragraph is bad, but, under the facts of the case, harmless.

ST. LOUIS & S. F. R. CO. *v.* MADDEN.

(Supreme Court of Kansas, Jan. 11, 1908.)

[93 Pac. Rep. 586.]

Negligence—Acts of Independent Contractor.*—It is a general rule that one who employs another to do a piece of work is not liable for the other's collateral negligence unless the relation of master and servant existed between them. The following exceptions to the general rule apply to and govern this case:

(a) Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party, he will not be permitted to avoid his liability by letting the performance of the work to another.

(b) One who has a piece of work to perform which in its nature is dangerous to others is under obligation to see that it is carefully performed so as to avoid such injury, and he cannot delegate the obligation to an independent contractor, and thus avoid his liability in case the work is negligently done to the injury of another.

Railroads—Fires—Negligence of Independent Contractor.*—A railroad company let a contract to another to burn a fire guard along its right of way. Through the negligence of the contractor, the fire escaped his control and damaged the property of the plaintiff.

Held: (a) That the work was performed as a part of the operation of the railroad, and that the railroad company could not by delegating the work to an independent contractor avoid the liability placed upon it by statute. Gen. St. 1901, § 5923.

(b) That the work being of a character from which in the natural course of things injurious consequences to others might be expected to result, unless means were adopted to prevent such consequences, the railroad company was bound to see that measures were taken to prevent such injury, and could not avoid the obligation by letting the work to an independent contractor.

(Syllabus by the Court.)

Error from District Court, Butler County; G. P. Aikman, Judge.

Action by R. M. Madden against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

*See note appended to White River Ry. Co. *v.* Batesville, etc., R. Co. (Ark.), 24 R. R. R. 313, 47 Am. & Eng. R. Cas., N. S., 313; footnotes appended to Liles *v.* Fosburgh Lumber Co. (N. Car.), 25 R. R. R. 517, 48 Am. & Eng. R. Cas., N. S., 517.

L. F. Parker, H. C. Sluss, and *W. S. Evans,* for plaintiff in error.

T. A. Kramer, for defendant in error.

PORTER, J. In 1904 plaintiff in error entered into a contract with Isaac Gregory to burn the grass on a strip 300 feet wide on each side of its right of way in Cowley county for a distance of 7 miles. While engaged in burning the strip the fire escaped from his control, ran over the land of defendant in error, and destroyed the grass on the ground and the hay in stack. The owner of the land recovered a judgment against the railroad company for the amount of the damages and attorney's fees . The railroad company brings error.

The sole contention of the railroad company is that Gregory was an independent contractor, not an employee of the company, and, inasmuch as the relation of master and servant did not exist, the company is not responsible for his negligence. The contract between the railroad company and Gregory was in writing, but was not put in evidence. It appears, however, that he had no other employment with the company, and the work was to be completed within a specified time for which he was to be paid the sum of $12 per mile. He testified that he was his own boss; that he procured from the owners of adjacent lands their consent to enter thereon for the purpose of burning the fire guard. On the day the fire was set out there was a strong wind blowing in the direction of the land of plaintiff, and it was this which caused the fire to escape control. Gregory testified that he was ordered by the foreman of the section gang of defendant company to do the work that day; and that in pursuance of such order he set out the fire which caused the damage.

The single question to be determined, therefore, is whether under the circumstances of this case the railroad company is liable for the negligence of Gregory. The general rule is that the employer cannot be held responsible for the negligence of an independent contractor. The party injured must look to the person whose actual negligence caused the injury. Kas. Cent. Ry. Co. *v.* Fitzsimmons, 18 Kan. 34; St. L., Ft. S. & W. R. Co. *v.* Willis, Adm'x, 38 Kan. 330, 339, 16 Pac. 728; Engel *v.* Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; Uppington *v.* City of New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Wabash, St. Louis & Pacific Railway Company *v.* Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696. For additional authorities, see note to Central Coal & Iron Co. *v.* Grider's Adm'r, 65 L. R. A. 455. There are, however, numerous well-established exceptions to the general rule. One of these is said to be that, where the employer retains the right to exercise authority as to the manner and method in which the work shall be performed,

he will be held liable for injuries to third parties the same as though the relation of master and servant existed between him and the contractor. With respect to this exception, the test most usually applied is not whether the owner actually exercised control over the work, but did he have the right to exercise direction or control? Atlantic Transport Co. *v.* Coneys, 82 Fed. 177, 28 C. C. A. 388; Hardaker *v.* Idle District Council, L. R. 1 Q. B. Div. 335; Pickens & Plummer *v.* Diecker & Bro., 21 Ohio St. 212, 8 Am. Rep. 55; Linnehan *v.* Rollins, 137 Mass. 123, 50 Am. Rep. 287. Of course, the fact that the owner exercised control over the work during its performance would furnish some ground for the inference that he had reserved the right to do so by the terms of the contract itself. It is also apparent that in a case where the injuries resulted directly from his interference it would make no difference whether or not the relation of master and servant existed, because, under such circumstances, he would be regarded as the principal tort-feasor. Davie *v.* Levy & Sons, 39 La. Ann. 551, 2 South. 395, 4 Am. St. Rep. 225; Faren *v.* Sellers & Co., 39 La. Ann. 1011, 3 South. 363, 4 Am. St. Rep. 256; Mahar *v.* Steuer, 170 Mass. 454, 49 N. E. 741.

On precisely the same principles rests the exception to the general rule which was recognized in Cloud County *v.* Vickers, 62 Kan. 25, 29, 61 Pac. 391, that where the injury is caused by defective construction inherent in the original plan of the employer, or where defective plans and specifications for the work have been adopted by the employer, the latter is liable. Again, where the work to be done is in its nature dangerous to others, however carefully performed, the employer will be held liable; because it is incumbent upon him to foresee such danger, and to take precautions against it. Atlanta Railroad Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, 234; Bower *v.* Peate, L. R. 1 Q. B. Div. 321; Covington & Cincinnati Bridge Co. *v.* Steinbrock & Patrick, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375. Nor is a person permitted to escape liability for his failure to perform a duty imposed upon him by law. This principle is true whether the duty arises by virtue of a statute as in C. K. & W. R. Co. *v.* Hutchinson, 45 Kan. 186, 25 Pac. 576, or where the duty is one imposed upon him by law. Fowler *v.* Saks, 18 D. C. 570, 7 L. R. A. 649. The cases illustrating the general rule and the numerous exceptions thereto may be found in a monographic note to Covington & Cincinnati Bridge Co. *v.* Steinbrock & Patrick, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375. See, also, extensive note to the case of Central Coal & Iron Co. *v.* Grider's Adm'r, 65 L. R. A. 455, and note to Louisville & N. R. Co. *v.* Tow, 66 L. R. A. 941.

Some of the exceptions we have noted above apply with more or less force to the present case. It is the contention that the railroad company made itself liable by directing that the work

should be done at a time when a strong wind was blowing. It directed the work to be done on a certain day. Presumably this was in accordance with the contract. There was evidence showing that the fire escaped from the control of Gregory on account of the high wind, and that except for the order and direction of the foreman the fire would not have been set out on that day. The fire was set out on Monday; the order of the foreman was given on the Saturday before, and there was no reason to suppose at that time that Monday would not be a suitable day for the work. It is not reasonable to presume that when the foreman directed Gregory to begin the work on the following Monday it was the intention thereby to deprive him of the use of all discretion in the matter, or that the order meant that he should begin the work on that day regardless of wind and weather. The right of the employer to exercise a limited control over the work without thereby destroying the independent character of the contract has been recognized by the courts in numerous cases. The rule seems to be well established that where the control reserved does not apply to the mode or manner of having the work done and does not in any way take the work out of the hands of the contractor it will not destroy the independent nature of the contract. K. C. M. & O. Ry. Co. *v.* Loosely (Kan.) 90 Pac. 990. In other words, the relation of master and servant is not to be inferred from the reservation by the employer of powers which do not deprive the contractor of his right to use his own methods in accordance with contract. See cases cited in note to Central Coal & I. Co. *v.* Grider's Adm'r, *supra*. It would hardly be a safe rule to establish to say that the mere direction of an employer that he wanted the work done at a certain time should render him liable for injuries resulting to third parties unless it were shown that the injuries were such as might reasonably be expected to result from the giving of the order.

There are two exceptions, however, to the general rule relieving an employer from liability caused by the negligence of an independent contractor, which, in our opinion, govern this case, and take it out of the operation of the rule. Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party he will not be permitted to avoid his liability by letting the performance of the work to another. A familiar illustration is found in the law of master and servant. Where the master owes to the servant the duty of providing a safe place to work, or there is imposed upon him by the law any duty or obligation to the servant, he cannot be letting out the performance of the work to an independent contractor, escape liability for injuries to the servant, caused by his failure to perform the obligation. And it makes no difference whether the duty is imposed by statute or by the common law.

Pickard *v.* Smith, 10 C. B. (N. S.) 470; Gray *v.* Pullen, 5 B. & S. 970.

A railroad company is liable in damages to any person whose property is injured by fire caused by the negligent operation of its railroad. Our statute (section 5923, Gen. St. 1901) recognizes this common-law liability, and provides that in actions against railroad companies to recover such damages certain rules of evidence shall obtain. It also allows the person injured to recover a reasonable attorney's fee in prosecution of the action. Thus there is cast upon the railroad company an obligation to the owner of property injured by fire, caused by the operation of the railroad, which is in many respects different from the obligation resting upon an individual who negligently permits fire to escape. This obligation is one which the railroad company cannot escape by farming out the contract for a part of the operation of its railroad to an independent contractor. In Fowler *v.* Saks, *supra*, the owner of a building who let a contract to repair his building, which required the taking down of a party wall, was liable to the adjoining owner for damages resulting therefrom. It appeared in that case that there was a building regulation in the District of Columbia requiring the owner of a building taking down a party wall to respond in damages to the adjacent owner for any injuries occasioned thereby. In the opinion the court uses this language: "A party under an antecedent obligation to do a thing, or to do it in a particular way, cannot get rid of his responsibility by deputing it to somebody else." It was also said that the duty in that case rested upon defendant by operation of the common law aside from any building regulation, and was one which could not be delegated to an independent contractor. The object of burning the fire guard which caused the injury to plaintiff's property was to enable the railroad company to operate its railroad without injury to the property of others. The purpose for which the work was performed was the same a railroad company has in view when it provides screens and sparks arresters upon its engines. The work was therefore performed by the company in the operation of its railroad. Thus, in Pound *v.* Port Huron & S. W. Ry. Co., 54 Mich. 13, 19 N. W. 570, the railroad company employed a contractor to grade its roadbed. Cattle escaped upon the right of way by reason of his failure to keep up the fences along the right of way. The company was held not to be released from its liability for the damage for the reason that the duty to keep its right of way fenced was imposed upon it by law.

The present case falls within another exception to the general rule which may be stated as follows: One who has a piece of work, the performance of which is in its nature dangerous to others, is under an obligation to see that it is carefully performed so as to avoid such injury, and he cannot delegate the

obligation to an independent contractor, and thus avoid his liability in case the work is negligently done to the injury of another. That such is the law is settled by the weight of reason and authority. Thus, in Bower *v.* Peate, L. R. 1 Q. B. 321, 326, a leading case, Cockburn, Chief Justice, used the following language: "That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

In Hardaker *v.* Idle District Council, L. R. 1 Q. B. Div. 335, the contractor was employed to construct a sewer for defendant. Owing to his negligence a gas main was broken, and gas escaped into the house where plaintiffs resided, causing injury to them and their property. Defendant was held liable because it owed a duty to the public, including plaintiffs, so to construct the sewer as not to injure the gas main, and it was said that this duty could not be delegated to another so as to relieve it from liability. To the same effect, see Tarry *v.* Ashton, 1 Q. B. Div. 314; Dalton *v.* Angus, L. R. 6 App. Cases, 740; Storrs *v.* City of Utica, 17 N. Y. 104, 72 Am. Dec. 437; Water Co. *v.* Ware, 16 Wall. (U. S.) 566, 21 L. Ed. 485; Black *v.* Christchurch Finance Co., App. Cases, 48. Covington & Cincinnati Bridge Co. *v.* Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, also a party wall case, was ruled the same way. In this case the court says: "The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute." Citing Bower *v.* Peate, L. R. 1 Q. B. Div. 321. "It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others, incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

In Circleville *v.* Neuding, 41 Ohio St. 465, and Railroad Company *v.* Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701,

the same doctrine is declared. In the latter case the railroad company employed a contractor to do for it certain plumbing which involved the opening of the public highway for the purpose of laying a drain. Plaintiff, in the nighttime, fell into the ditch by the negligence of the contractor in not protecting it. The railroad company was held liable. It was stated in the syllabus, as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor." The same principle is also one of the grounds upon which the exception is predicated in Fowler *v.* Saks, *supra.* Indeed, authorities might be multiplied in support of the proposition that, where the work is inherently dangerous to others, the employer is under an obligation to see that it is carefully performed, and cannot escape the liability by the employment of an independent contractor. In the following cases, most of which involved damages occasioned by fires set out by contractors, the railroad company or employer was relieved of liability on the ground that the negligence was that of an independent contractor; but, so far as we have examined the cases, in none of them does it appear that the contractor was employed for the purpose of setting out fires as in the present case; the fires were either set out to facilitate the work of clearing the land or right of way or for some incidental purpose, and escaped through the negligence of the contractor or his employees: Eaton *v.* European & North American Railway Company, 59 Me. 520, 8 Am Rep. 430; Callahan *v.* Burlington & Missouri River R. R. Co., 23 Iowa, 562; Burbank *v.* Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400; Woodhill *v.* Great Western Railway Co., 4 U. C. C. P. 449, 451; Carroll *v.* Corporation of Plympton, 9 U. C. C. P. 345; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Gillson *v.* North Grey Railway Co., 35 U. C. Q. B. R. 475. In the last-mentioned case two of the judges dissented, and one of the questions involved was whether there was such an interference on the part of the employer as to destroy the independent character of the contract.

The case of Wabash, St. Louis & Pacific Railway Company *v.* Farvar, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696, is apparently opposed to this doctrine. There the railroad com-

pany was engaged in constructing a well from which to supply water for its engines. The running water interfered with the work, and the railroad company contracted with the owner of a small, portable, steam engine to pump the accumulating water in order to keep it out of the way. The plaintiff driving on the highway was injured by reason of his horses' fright at the engine. It was held that as the railroad company had no control over the use of the engine it was not liable. Upon examination, however, it will be found that the principles upon which the decision turned are not in conflict with the doctrine we are considering. Here was an independent contract to do something which might be said to be a part of the operation of the railroad; but obviously the question whether the work was a part of the operation of the road was unimportant, for the reason that the company owed no particular duty by statute or common law to the public or to the plaintiff. The work was not dangerous, nor did it constitute a nuisance. In the opinion it was said that the use of a portable steam engine for the purpose of pumping water in close proximity to a public highway was not necessarily a nuisance if the engine was used in the proper manner. Injury could only result from its negligent use. It was also remarked that the work was not of a character which imposed upon the employer any peculiar obligation to the plaintiff or others using the highway, and that if the employer had been under peculiar obligations to the person injured it would have been liable for a breach of that duty, regardless of the relation between the employer and the person whose negligence caused the injury. In other words, the company might let to an independent contractor the performance of work in connection with the operation of its road without necessarily becoming liable to third persons for the negligence of the contractor. It is only where the company owes some duty or obligation to the third party, placed upon it by statute or arising out of the peculiar nature of the work itself, which prevents it from escaping liability by an independent contract.

The general rule and the particular exception we are considering was well stated by Lord Blackburn in Dalton *v.* Angus, *supra*, in the following language: "Ever since Quarman *v.* Burnett" (6 M. & W. 499) "it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it

is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Let it be conceded that the burning of the fire guard was a part of the operation of the railroad, and the conclusion irresistibly follows that the defense of an independent contract is of no avail. The statute placed upon the company an additional and peculiar obligation to the owner of property injured by fire in the operation of its road; it is made liable, not only for all damage sustained, but for reasonable attorney's fees in an action brought to recover therefor. No obligation to pay attorney's fees rested upon an individual through whose negligence damages by fire should result to the property of another; and in order to recover against the individual the plaintiff would be obliged to prove negligence, while the statute provides that where the action is brought against the company, and the fire was caused by the operation of the road, negligence is presumed as soon as these facts are shown.

We find no difficulty in determining that the work of burning the fire guard was a part of the operation of the road. The company could not, therefore, absolve itself from the liability by letting out the work to an independent contractor, for the reason that it owed to the plaintiff an obligation placed upon it by the law to respond in damages for all injuries by fire thus caused; and for the further reason that it employed a dangerous agency, which, in the experience of every one, required that precautions be taken to prevent damage to the property of others. Thus, a second duty was cast upon the railroad company not to cause the work to be done either directly by its employees or indirectly by a contractor, without seeing that precautions were taken to prevent the escape of fire and consequent injury to the property of plaintiff. Neither of these obligations or duties could be avoided by delegating the performance of the work to another.

It follows that the judgment must be affirmed.

CHICAGO, M. & ST. P. RY. CO. *v.* DONALDSON.

(Circuit Court of Appeals, Eighth Circuit, November 20, 1907.)

[157 Fed. Rep. 821.]

Railroads—Injury to Person at Crossing—Contributory Negligence —Evidence.*—Plaintiff's intestate was struck by a train and killed while driving in the evening over a railroad crossing on a well-traveled village street. He was in full possession of his faculties, had resided in the vicinity of the crossing for many years, and was thoroughly familiar with it. The track was straight for a mile or more, the train, which was on its regular time, was lighted, and the headlight burning and from any point within 50 feet of the track could be seen for a long distance. Held, that conceding the alleged negligence of the railroad company, in that the train was running at excessive speed and failed to give the statutory signals, in the absence of exceptional conditions, the deceased was chargeable with contributory negligence in failing to see or heed the approach of the train, which precluded a recovery for his death.

Same—Defective Crossing.—Evidence considered, and held not to sustain a verdict finding that the death of a person killed by a railroad train while driving over a highway crossing was due to his being delayed or held on the crossing by reason of a defect therein.

In Error to the Circuit Court of the United States for the District of Minnesota.

Writ of error by the railway company to review a judgment obtained by Donaldson's administrator.

F. W. Root, for plaintiff in error.

David W. Parsons (*Parsons & Bowler* and *A. B. Childress*, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. Plaintiff's intestate was killed in a collision at a railroad crossing over West Mill street, in the village of Dundas, Minn., about half past 5 of the evening of December 4, 1904. He was 49 years of age, and his faculties of sight and

*See foot-notes appended to Schwartz *v.* Delaware, etc., R. Co. (Pa.), 25 R. R. R. 10, 48 Am. & Eng. R. Cas., N. S., 10; foot-notes appended to Baker *v.* Tacoma Eastern Ry. Co. (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723; foot-notes appended to Annapolis, etc., Ry. Co. *v.* State (Md.), 25 R. R. R. 733, 48 Am. & Eng. R. Cas., N. S., 733; foot-notes appended to Hamblin *v.* New York, etc., R. Co. (Mass.), 25 R. R. R. 265, 48 Am. & Eng. R. Cas., N. S., 265; foot-notes appended to Byrnes *v.* New York, etc., R. Co. (Mass.), 23 R. R. R. 317, 46 Am. & Eng. R. Cas., N. S., 317.

hearing were unimpaired. The street, which is a well-traveled thoroughfare, runs east and west, and the railroad northeast and southweast through the village. The deceased had lived in Dundas about 36 years, and for many years in the immediate vicinity of the accident. He was thoroughly familiar with the crossing. On the occasion in question he was driving a span of horses hitched to a wagon on which was a hay rack with a load of wood. When last seen alive he was on the wagon. His course was westward on the street towards the crossing. The train came from the northeast. It was a regular passenger train, was on time, and had been running on the same schedule for several years. The engine struck between the horses and the wagon, throwing the former on the west side and the latter on the east side of the track, thus indicating their probable position at the time of collision. The plaintiff charged that the company was negligent (1) in the failure of the engineer to give the statutory signals of the approach of the train; (2) in running through the village at an excessive speed; and (3) in having a defective crossing. The defense was a denial of negligence and an assertion of contributory negligence on the part of the deceased. At the conclusion of the evidence the company presented a request for a direct verdict, which was denied by the trial court.

We will assume, without further consideration, that plaintiff's evidence, though noticeably slight, was sufficient to justify the jury in finding there was negligence both in respect of signals and rate of speed and proceed to consider the defense of contributory negligence and in connection therewith the condition of the crossing. From the West Mill street crossing the railroad track ran northeastward in a straight line for nearly a mile. The track was near the center of a broad right of way in which there were no obstructions preventing one from seeing an approaching train for a long distance. The testimony of the village blacksmith, plaintiff's first witness, may be accepted as fairly showing the distance the deceased could have seen up the track as he drove towards the crossing. The witness said, and he was not contradicted, that the corner of the picket fence at the northeast corner of West Mill street and the railroad right of way (on the right of the deceased as he approached the crossing) was 58 feet from the center of the track. He, the witness, stood a foot or two inside of the fence corner. He sent a man up the track, and the point where he disappeared from his view was 792 feet from the crossing. He also testified that with every step he took towards the crossing he could see further along the track. As the train approached the crossing on the evening in question, the headlight of the engine was burning, sparks were being thrown from the smokestack, and the coaches were lighted. It was conclusively shown that there were no fixed obstacles preventing deceased whilst at any place within 50 feet or so of the

track from seeing the lights of the train for a long distance. In the absence of exceptional conditions, the case would therefore fall within the rule of Northern Pacific *v.* Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Tomlinson *v.* Railway, 67 C. C. A. 218, 134 Fed. 233; Wabash R. Co. *v.* De Tar, 73 C. C. A. 166, 141 Fed. 932, 4 L. R. A. (N. S.) 352. An attempt was made to show that deceased might have been prevented from seeing by snow which was being blown about at the time. There was a little snow on the ground which was being occasionally raised by a northwest wind. The course of the wind was across the track, and, if deceased had looked in the direction of the train, it would not have been in his face. A number of witnesses introduced by both parties testified to having seen the lights of the train at various distances, ranging from 400 to 1,400 feet from their points of observation. No witness who looked testified that snow prevented him from seeing excepting one, and he said that after he had turned a corner he saw the headlight about 400 feet away. One of the plaintiff's witnesses who was looking in the teeth of the wind saw the lights of the train when it was about 1,400 feet away. The evidence upon this subject was so conclusive that there was no dispute for the decision of the jury.

As to the condition of the crossing: A statute of Minnesota imposed upon railroad companies the duty to build and maintain good and sufficient crossings at all points where their railroads are intersected by public highways. It provided that the planks next to the rails should not be more than 2½ inches from the inside surface of the rails; also, that the railroad companies should be liable for any damages resulting from failure to comply with the law. Gen. St. Minn. 1894, §§ 2683, 2685, 2686. It was shown at the trial that the sides of the planks of the crossing were in places as much as three inches from the inner sides of the rails. It is contended that such condition was a proximate cause of the accident, also that it explains why the ability of a traveler on the highway to see that a train was approaching did not serve to prevent the accident to deceased. To be more definite, it is contended that the condition of the crossing and evidence of other circumstances were sufficient to justify the jury in finding that the foot of one of the horses driven by deceased was caught in a space between a plank and a rail, and so delayed his movement that the collision occurred. A bent horseshoe was presented to the jury. One of the plaintiff's witnesses testified that on the morning after the accident he saw it lying beside the track but did not pick it up. There was testimony that a shoe was missing from the right hind foot of the off horse, and that the nail holes in its hoof were enlarged as though a shoe had been torn therefrom. There was no other proof that there had been a shoe on the hoof just before the collision and no other proof that the particular shoe came from a horse driven by

deceased. A witness testified that a week or 10 days after the accident he noticed that a sliver was missing from one of the planks next to the rail on the west side of the crossing, and that it had the appearance of having been recently torn away, and that at that point the side of the plank was three inches from the rail. This was all of plaintiff's proof upon that subject. There was no other evidence showing when the sliver was torn from the plank, or how it was torn, or if by a horse, then whose horse, and under what circumstances. As against this, the president of the village council testified that he and a number of others were at the crossing on the morning after the accident, and when some one queried whether one of the horses could have been caught in the space between the planks and rails he made a close and thorough investigation, and that no such sliver as that mentioned had been torn away. A section hand of the company, also present, made a similar investigation, and took measurements of the plank, and he testified that no sliver was missing. The engineer of the train testified that, though his position was on the right or west side of the engine, he noticed a few seconds before the collision the horses moving upon the track, and that they were in motion when the engine struck them. We are of the opinion that the finding that the movement of deceased was delayed or prevented by a defective or insufficient crossing, was the result of surmise or speculation, and that it lacks that support of substantive proof and fair and reasonable inferences therefrom which alone justifies a verdict imposing a responsibility for damages. The jury inferred that the horse was fully shod when it went upon the crossing, and that the shoe produced came from the horse. Possibly these inferences were permissible in view of the evidence, but it was a mere guess that the horse's hoof was caught in a space between a plank and a rail; that it was so caught before the collision and therefore contributed to the collision; that the loss of the shoe was not the result of the collision itself without regard to a space between a plank and a rail; that the missing sliver had some connection with the accident; that it was torn from a plank in the crossing immediately before or at the time of the collision and not afterwards; and, therefore, that the deceased, having an unobstructed view of the track for a long distance, attempted to cross when he had sufficient time to do so but was delayed by a defective crossing until the train came up. We think the verdict rests too largely on conjecture. Patton *v.* Railway, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

The judgment is reversed and the cause remanded for a new trial.

THIRTEENTH & FIFTEENTH STS. PASS. RY. CO. *v.* BROAD STREET RAPID TRANSIT ST. RY. CO. *et al.*

(Supreme Court of Pennsylvania, June 25, 1907.)

[67 Atl. Rep. 901.]

Quo Warranto—Who May Maintain.—A private individual cannot maintain a bill in the nature of quo warranto to test a street railway company's right to a public street in a city.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Thirteenth & Fifteenth Streets Passenger Railway Company against the Broad Street Rapid Transit Street Railway Company and the Philadelphia Rapid Transit Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

N. Du Bois Miller, H. La Barre Jayne, and *J. Rodman Paul,* for appellant.

Ellis Ames Ballard, John G. Johnson, and *E. O. Michener,* for appellee.

PER CURIAM. This is a bill in equity to enjoin the defendant company from proceeding under its charter to lay railway tracks on Broad street in the city of Philadelphia. The basis of the relief sought was the invalidity of the franchise purported to be granted. The learned judge below rightly held that this was in effect a *quo warranto* to challenge the validity of the charter itself and could not be sustained by a private relator. He therefore dismissed the bill. A *quo warranto* was then issued at the relation of the Attorney General, and the other questions argued by the appellant in this case, so far as they are relevant, will be considered in disposing of that.

Decree affirmed.

WHITNEY *v.* CHICAGO, A. & N. RY. CO. *et al.*

(Supreme Court of Iowa, March 6, 1907.)

[110 N. W. Rep. 912.]

Railroads—Railroad Aid—Enforcement—Conditions Precedent.*—Where a notice for election on the question of levying a tax to aid railroad construction provides that the tax shall be collected the first year after being voted if the line is completed and in operation between certain points and a depot is built and permanently maintained within 100 rods of a certain place, the provision is complied with when the line is in operation between the points, and a depot is constructed in a permanent manner as required, though off the main line and on a spur track.

Same.*—Where a tax is voted in aid of railroad construction under a notice providing that the tax should be paid on the road being put in operation between two certain points, the tax is earned when the road is in actual operation between those points, whatever the financial ability of the company to extend it further.

Same.*—Where a railroad company, in constructing its line, executes bonds incumbering it more than $18,500 per mile, in violation of Code, § 2088, but procures the cancellation of the excess before the hearing, and none of the bonds have been negotiated, there is no fraud to sustain an injunction against collecting taxes voted in aid of the construction.

Appeal from District Court, Linn County; J. H. Preston, Judge.

Action in equity for an injunction to restrain the collection of a tax, etc. From a decree in favor of defendants, the plaintiff appeals. Affirmed.

Smith & Smith and *Voris & Haas,* for appellant.

Remley & Remley and *Donson, Kenline & Roedell,* for appellees.

BISHOP, J. Acting under authority of Code, § 2084 *et seq.*, and on January 20, 1904, the electors of Boulder township, Linn county, voted a tax of 3 per cent. on the taxable property of said township for the purpose of aiding the defendant railway company in the construction of a line of railway extending from the city of Anamosa, in Jones county, to the city of Waterloo in Black Hawk county. Such was the purpose of the tax as stated

*For the authorities in this series on the subject of taxation, etc., in aid of railroads, see foot-notes appended to Arkansas So. R. Co. *v.* Wilson (La.), 23 R. R. R. 727, 46 Am. & Eng. R. Cas., N. S., 727.

in the notice given of the election, and such notice also contained the statement that "said tax proposed to be voted to be collected in one payment the first year after the same is voted, provided said line of railway is then completed and in operation from the city of Anamosa to the village of Prairieburg in said Boulder township, and in no case is such tax or any part thereof, to become due and collectible until said line of railway is fully completed and in operation between said city and village," etc. The notice contained the further provision that "on presentation of certificates issued by the county treasurer upon the payment of said tax, the said railway company shall issue to the holders of such certificates shares of its capital stock as provided by section 2088 of the Code." So, also, this: "For the consideration of the tax above described the Chicago, Anamosa & Northern Railway Company does hereby agree to build and permanently establish and maintain a freight and passenger depot within 100 rods from the section corner * * * same being center of Main street in the town of Prairieburg." A tax was levied pursuant to said election, and the defendant Carroll, treasurer of said county of Linn, was proceeding with the collection thereof when this action was brought. The action is grounded upon three principal matters of contention: (1) The company had not completed its line of road to and established a permanent depot in Prairieburg as stipulated for when the tax was voted. (2) That the company is insolvent, and unable, by legitimate means, to construct the road to Waterloo, that being one of the conditions in consideration of which the tax was voted. (3) That after the tax was voted the company executed a mortgage upon the road securing bonds in excess of $18,500 per mile, in violation of law, and thus having the effect to render its stock valueless and working a fraud upon the taxpayers. These matters we shall consider in the order of their statement.

1. The evidence makes it appear that the road has been built and is in operation from Anamosa to Prairieburg, and to a further station beyond called "Coggon." The precise matter of contention is that the main line of the road as constructed is distant about 135 rods at its nearest point from the center of Main street; that a spur track nas been built from the main line to a point about 80 rods distant from the center of Main street and the depot has there been constructed. It is the argument that this fails of compliance with the stipulation on which the tax was voted. We are not disposed to share in the view thus taken. Looking to the notice, which alone evidences the stipulation, it provides that the road shall be built to Prairieburg, and that the depot shall be built within 100 rods of the center of Main street. Now the evidence discloses that the road enters the corporate limits of the town, and that the spur track is wholly within such limits. There is, therefore, not only a substantial com-

pliance, but a strict compliance. And the fact that the depot building is made to face a spur track instead of the main line track cannot, on any line of reasoning, be given operation to defeat this conclusion. The essence of the stipulation was convenient and accessible railway station service, and it is not even suggested in the evidence or argument that the depot as located results in inconvenience to any one, or that the station facilities are in any way other or different from what they would be were the depot facing directly on the main line. Our conclusion finds direct support in Railway *v.* Rich, 33 Iowa, 113. See, also, Fitzgerald *v.* Britt, 43 Iowa, 498, and Jenkins *v.* Railway, 29 Iowa, 255. It is also a part of plaintiff's contention that the depot building is not permanent in character and permanently erected at its present location; that the defendant company contemplate ultimately erecting their permanent depot on the main line track. The proofs show that the building is well built, well adapted to the purpose and sufficiently large for all needs—present and for some time in the future. The only basis for the contention is that no permanent foundation has as yet been placed under it; hence that it can easily be moved. Officers of the company were witnesses, and they denied any intention or purpose on the part of the company to make a change. In this situation plaintiff can find no room to rest a complaint.

2. The second ground of contention is wholly without merit. It was not shown that the company was insolvent. On the contrary, what evidence there is in the record on the subject discloses that the value of its property is in the neighborhood of half a million dollars, whereas its indebtedness does not greatly exceed $150,000. Moreover, it was not a condition upon which the tax was voted that the company should construct its road to Waterloo. The tax was earned when construction was complete to Prairieburg.

3. It appears to be true that the defendant company had executed a series of bonds, secured by a trust deed covering its property; and, further, that the bonds as executed exceed in amount the sum for which, under Code, § 2088, bonds may be issued—the excess amount being $250 per mile. It appears, however, that before the final submission of the case the company caused to be canceled a portion of the bonds, bringing the amount down to less than the amount authorized by law. It also appears that none of the bonds executed had ever been negotiated, but all remain in the treasury of the company or under its control. Now, certainly, as long as the bonds remain unnegotiated no one can be said to be harmed—no one has sustained a complainable injury. Assuming, however, that the company intend to, and will, negotiate the bonds, we may inquire what, if any, enforceable right of plaintiff will thereby be infringed, or, changing over the inquiry, what substantial wrong will be thereby inflicted upon him.

Was there a condition attached to the vote ordering a tax levy and collection to the effect that the property of the company should remain unincumbered, and a violation of which condition would operate to defeat the consideration for the tax? And were the interests of plaintiff as a stockholder, or prospective stockholder, injuriously affected—and we assume the extreme—by the issuance and negotiation of the bonds? Each of these questions is readily answerable in the negative, and they may be considered together. As we have seen, the conditions upon which the tax was voted are those which are contained in the notice of election. The condition there is simply that stock in the company shall be issued to the persons called upon to pay the tax. And this is not pursuant to any contract relation save as such can be said to arise from the requirement of the statute that stock shall be issued upon proper demand in all such cases. Code, § 2088. There is, then, no condition, and no agreement, express or implied, operating to forbid the issuance of bonds or the doing of any other act which, in the course of its business, the company might lawfully do. It follows that the taxpayer must be held to take stock to which he is entitled in virtue of the statute on precisely the same basis as though he had subscribed therefor in the ordinary way, or had gone into the open market and made purchase thereof. No one will contend that an enforceable contract to take and pay for stock in a corporation becomes unenforceable eo instante upon the issuance of bonds secured by trust deed by the corporation pursuant to the general authority given by law to do so. To release a subscriber from his contract to take shares, there must be some distinct and material alteration in the purpose, character, etc., of the corporation whereby it has become essentially different from the corporation to which the subscription was made. An outline of the subject is to be found in 10 Cyc. 405 et seq., accompanied by a copious citation of cases. There is no force in the contention of counsel that the execution by the company of a trust deed covering its property was, in effect, an alienation of such property, and hence, on authority of Manning *v.* Mathews, 66 Iowa, 675, 24 N. W. 271, and other like cases, sufficient of itself to defeat the collection of the tax. The doctrine of the cases relied upon is that a taxpayer entitled to stock in the corporation, in aid of which a tax has been voted, cannot be required to accept stock in some other corporation to whom the property, franchises, etc., and the control thereof, has been transferred. Quite different is the case where, as here, the original company retains ownership and control, but, in the ordinary course of business, has, within legal limits, pledged its property as security for a loan borrowed to enable it to more effectually carry out the purpose of its organization. Moreover—and now considering plaintiff in the relation simply of a stock subscriber—there can be no ground

for complaint based upon the proposed negotiation of the bonds. The value of the stock interest to be acquired by him will not thereby be impaired. In the absence of any evidence to the contrary—and such is the condition of the record—we must assume that the bonds will be negotiated at par. Hence the only change to be worked is in the form of the assets—the value of resources remain as before. It is upon these considerations that we conclude the complaint of plaintiff to be without merit.

Some other matters are discussed in argument by counsel for appellant. They are either disposed of by what has already been said, or are without merit. It is our final conclusion that the court below rightly refused plaintiff any relief, and the judgment is affirmed.

PEORIA, B. & C. TRACTION CO. *v.* VANCE *et al.*

(Supreme Court of Illinois, Feb. 21, 1907.)

[80 W. L. Rep. 154.]

Eminent Domain—Damages—Injury to Property Not Taken.*—Since the measure of damages to land not taken in proceedings to condemn land for an electric railroad right of way is the difference in the fair cash market value of the land before and after the construction of the road, the jury, in determining the amount of damages to land not taken, must deduct benefits actually enhancing the market value of the property, for such benefits are special and not general, though they are common to other property in the vicinity.

Same—Evidence—Instructions.—Where, in a proceeding by an electric railroad to condemn land for a right of way through a farm, the jury might find that the farm would be enhanced in value by reason of the operation of the railroad and that other farms in the vicinity would also be increased in value from the same cause, an instruction that the jury should not set off against damages to the land not taken any general benefits which the land would share in common with other land in the same vicinity, and that only such benefits as were special to the farm and not common to other farms in the vicinity could be thus set off was prejudicial to the railroad.

Appeal from McLean County Court; R. A. Russell, Judge.

Proceedings by the Peoria, Bloomington & Champaign Traction Company for the condemnation of land for a right of way

*For the authorities in this series on the question, what do, and do not, constitute benefits to the landowner from the construction and operation of a railroad on or near his property, see foot-notes appended to St. Louis, etc., R. Co. *v.* Continental Brick Co. (Mo.), 21 R. R. R. 482, 44 Am. & Eng. R. Cas., N. S., 482.

through the lands of Frank A. Vance and others. From a judgment awarding compensation, petitioner appeals. Reversed and remanded.

Livingston & Bach, for appellant.
Weltz, Sterling & Whitmore, for appellees.

SCOTT, C. J. Appellant, Peoria, Bloomington & Champaign Traction Company, is constructing an interurban electric railroad from Bloomington to Peoria, in this state, which passes through the village of Danvers. On June 9, 1906, it instituted proceedings in the county court of McLean county to condemn a strip of land off the south side of appellee's farm for its right of way. This farm is between the village of Danvers and the city of Bloomington, being about one mile from the former and nine miles from the latter. Appellees filed a cross-petition praying that damages occasioned to the balance of the farm by reason of the taking of said strip and the construction and operation of the railroad thereon be ascertained and awarded to them. The jury, after hearing the evidence and viewing the premises, returned a verdict awarding to appellees $1,600 as compensation for land taken and $1,900 as damages to land not taken. After overruling appellant's motion for a new trial the court entered judgment in accordance with the verdict, from which judgment appellant appeals to this court.

Appellees' farm consists of 172 acres. The land sought to be taken is a strip, containing 4.43 acres, off the south side of the farm and adjoining the public highway between Bloomington and Danvers. The right of way enters the farm at the southeast corner and proceeds west, taking a strip 82½ feet wide until it reaches the barn. It is then narrowed to 60 feet in order to avoid taking the house and barn, which are only from three to five feet north of the north line of this 60-foot strip. After passing the buildings the right of way is widened to 82½ feet, and so continues until it reaches the west line of the farm. The portion of the 172 acres not taken will all lie north of the right of way and will be separated by it from the highway on the south. In constructing the railroad it will be nesessary to make a cut in front of the house and barn. The deepest portion of the cut will be in front of the house, where the top of the rail will be two feet below the present surface of the ground. It was practically conceded by appellant, on the trial, that the buildings would have to be moved to another part of the farm, and that the portion of the farm not taken would be damaged in other respects, but it was contended that such damages were to a great extent, if not entirely, offset by the benefits which the land would receive from the construction and operation of the railroad, and the testimony of witnesses was offered to sustain that contention. Some of these witnesses testified that the benefit would equal the damages, and that there would be no depreciation in the market value of the

land not taken, while others of appellant's witnesses were of the opinion that the damages would exceed the benefits, but not in as large an amount as the jury awarded for damages to the land not taken. Such amount so awarded for damages last mentioned, however, was within the range of the testimony of the witnesses for the appellees.

Appellees offered, and the court gave to the jury, the following instruction, numbered 11: "The court instructs the jury that you should not set off against damages to the land not taken by any general benefits which you might believe, from the evidence, that this farm would receive on account of the location of this railroad near it. By general benefits are meant those which the land would share in common with others in the same vicinity, and all evidence in this case before the jury relating to general benefits, such as that of making a better market or affording convenience for trade and travel, should not be considered by the jury. Only such benefits as are special to this farm and not common to the other farms in the vicinity can be set off against damages to the land not taken, and, if there are no special benefits to this farm by reason of the location of this railroad near it—that is, no benefits which would not appreciate the fair cash market value of this particular farm—then the jury, making up their verdict, should consider no benefits whatever to the land not taken.

Appellant contends that this instruction announced an incorrect statement of the law, and that the court, in giving it, committed reversible error. We agree with this contention. Since the adoption of the Constitution of 1870, it has been uniformly held by this court, in such cases as this, that the measure of damages to land not taken is "the difference in the fair cash market value of the land before and after the construction of the railroad," or "the amount, if any, which lands not taken will be depreciated in their fair cash market value by the construction and operation of the proposed road. Chicago & Pacific Railroad Co. *v.* Frances, 70 Ill. 238; Page *v.* Chicago, Milwaukee & St. Paul Railway Co., 70 Ill. 324; Eberhart *v.* Chicago, Milwaukee & St. Paul Railway Co., 70 Ill. 347; Chicago, Burlington & Northern Railroad Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814; Metropolitan West Side Elevated Railway Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; Allmon *v.* Chicago, Paducah & Memphis Railroad Co., 155 Ill. 17, 39 N. E. 569; Illinois Central Railroad Co. *v.* Turner, 194 Ill. 575, 62 N. E. 798; Chicago & Milwaukee Electric Railroad Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66; Illinois, Iowa & Minnesota Railway Co. *v.* Easterbrook, 211 Ill. 624, 71 N. E. 1116; Hartshorn *v.* Illinois Valley Railroad Co., 216 Ill. 392, 75 N. E. 122; Chicago Southern Railway Co. *v.* Nolin, 221 Ill. 367, 77 N. E. 435; Chicago, Bloomington & Decatur Railway Co. *v.* Kelly, 221 Ill. 498, 77 N. E. 916.

Under the rule adopted in this state for determining whether, or in what amount, property not taken will be damaged by the construction and operation of a railroad, any benefits which are not conjectural or speculative, and which actually enhance the market value of such property, are to be considered as special benefits and not as general benefits, within the meaning of the rule that general benefits cannot be considered in determining whether, or in what amount, property not taken will be damaged. Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and, if it has, the extent of the depreciation in value. Metropolitan West Side Elevated Railroad Co. *v.* Stickney, *supra*; Metropolitan West Side Elevated Railroad Co. *v.* White, 166 Ill. 375, 46 N. E. 978; Farnestock *v.* City of Peoria, 171 Ill. 454, 49 N. E. 496.

In the Stickney Case it was said, at page 383 of 150 Ill., page 1104 of 37 N. E. (26 L. R. A. 773): "Thus, the situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted, before and after the construction of the public work, and, indeed, every fact and circumstance legitimately tending to show a depreciation or enhancement of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land without and with the proposed taking for public use, while, on the other hand, a consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which, in determining the injury or benefit to the particular tract of land, cannot be other than conjectural and speculative, is excluded."

By appellees' eleventh instruction, which is above set out, the court, after advising the jury that they should not consider any general benefits that the farm would receive from the location of the railroad near it, stated that "by general benefits are meant those which the land would share in common with others in the same vicinity," and that "only such benefits as are special to this farm and not common to the other farms in the vicinity can be set off against damages to the land not taken." If the jury believed, as they well might from the evidence, that appellees' farm would be enhanced in value by reason of the construction and operation of the electric railroad, it is more than probable that they also believed that other farms in

the vicinity would also be increased in value from the same cause. The prejudicial effect of the instruction is therefore apparent.

It is unnecessary to consider other errors assigned.

For the error in giving appellees' eleventh instruction, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

CONNELLSVILLE GAS COAL CO. *v.* BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania, Jan. 7, 1907.)

[65 Atl. Rep. 669.]

Adverse Possession—Right of Way.*—Where a railroad company takes land for its right of way without compensation, it cannot acquire title by adverse possession.

Eminent Domain—Remedies of Landowners—Ejectment—Stay of Execution.—Where a railroad company has taken land for its right of way without compensation, the owner may maintain ejectment, but an execution under a judgment in his favor will be stayed to allow condemnation proceedings.

Appeal from Court of Common Pleas, Fayette County.

Action by Connellsville Gas Coal Company against Baltimore & Ohio Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

Thomas H. Hudson, James R. Cray and *D. W. McDonald,* for appellant.

John C. Uhle and *Edward Campbell,* for appellee.

BROWN, J. In 1882, the Ohio & Baltimore Short Line Railway Company, with the consent of the appellee, the owner of the three tracts of land in controversy, entered upon them and constructed a railroad over them. In the construction of this railroad, and in making the improvements necessary in connection with the same, the railway company expended large sums of money, and it and the Baltimore & Ohio Railroad Company, the appellant, its lessee, have, from the time the lands were so occupied for railroad purposes up to the institution of this suit, in January, 1905, been in

*For the authorities in this series on the subject of the acquisition of the right of way for railroad by prescription or adverse possession, see foot-notes appended to Leidigh *v.* Philadelphia, etc., R. Co. (Pa.), 21 R. R. R. 512, 44 Am. & Eng. R. Cas., N. S., 512.

the exclusive and undisputed possession of them. As this possession has been exclusive and is claimed by the appellant to have been adverse for more than 21 years, its contention is that the statute of limitations of March 26, 1785 (2 Smith's Laws, p. 299), is a bar to the plaintiff's right to recover.

That the statute of limitations is not a bar to the right of the plaintiff to be compensated for the taking of its lands by the railway company having the right of eminent domain is not an open question with us, and the learned trial judge correctly so held in directing a verdict for the appellee, on which judgment was entered "with stay of execution thereon for ninety days to enable the railroad company to proceed under the statute and procure the condemnation of land, etc." The Ohio & Baltimore Short Line Railway Company having entered upon the lands of the appellee for the purpose of constructing its road upon them, neither it nor its lessee can set up an adverse holding, either under the statute of limitations or as a prescriptive easement, in bar of the right of the appellee to receive compensation for whatever damages it may have sustained. Wheeling, Pittsburg & Baltimore Ry. Co. *v.* Cleland, 37 Leg. Int. 466; Covert *v.* Pittsburg and Western Railway Co., 204 Pa. 341, 54 Atl. 170; Carter *v.* Ridge Turnpike Co., 208 Pa. 565, 57 Atl. 988. The uncontradicted testimony is that the appellee has not been compensated for the taking of its lands, but, having permitted the railway company to enter upon them in advance of the ascertainment of damages and make large expenditures upon them in the construction and operation of its railroad, it would be inequitable to now permit them to be taken from the appellant, unless it should refuse to proceed in the statutory way to have the damages ascertained. This action of ejectment, equitable in its character, was properly brought for the purpose of quickening the appellant to the performance of its duty to take proper steps to ascertain what compensation ought to be paid to the appellee. Oliver *et al. v.* Pittsburg, V. & C. Ry. Co., 131 Pa. 408, 19 Atl. 47, 17 Am. St. Rep. 814.

The effect of the judgment below is to permit the appellant to retain possession of the lands upon making proper compensation for whatever damages may have been sustained by the appellee, and it is therefore affirmed.

COWLES *v.* NEW YORK, N. H. R. Co. *et al.*

(Supreme Court of Errors of Connecticut, June 7, 1907.)

[66 Atl. Rep. 1020.]

Railroads—Construction—Right to Establish Grade Crossings.*—A grade crossing or the condition existing by reason of such an intersection of two highways is in the nature of a nuisance, and cannot lawfully exist unless in pursuance of state authority.

Same—Responsibility of Railroad for Injuries.*—When a grade crossing is authorized by the state, neither the railroad, as charged with the maintenance of the railroad highway, nor the town or other corporation, as charged with the maintenance of the carriage highway, is responsible for the dangers resulting solely from such a construction of the two highways. The only duty they owe travelers is the statutory duty of maintaining in a safe condition the highway as established.

Same—Obstruction of View—Negligence.†—The mere neglect of a railroad company to cut down trees on its right of way in the vicinity of a grade crossing is not in itself actionable negligence, in the absence of any statute requiring it to keep its right of way free from unnecessary obstructions to a view of the tracks by persons using an adjacent highway, although it may be considered with other circumstances in determining whether the company exercised care in the operation of its cars at a particular time.

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by Walter G. Cowles, administrator of Nellie F. Cowles, against the New York, New Haven & Hartford Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The defendants own and operate a railroad running from Middletown, crossing the Connecticut river upon a bridge, and thence running easterly to the village of East Hampton and beyond. About three miles westerly from East Hampton the railroad crosses at grade the main highway between Middletown

*See extensive note, 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519; Rainey *v.* Red River, etc., Ry. Co. (Tex.), 22 R. R. R. 399, 43 Am. & Eng. R. Cas., N. S., 399; Townsend *v.* Norfolk Ry. & L. Co. (Va.), 19 R. R. R. 635, 42 Am. & Eng. R. Cas., N. S., 635; Atchison, etc., Ry. Co. *v.* Armstrong (Kan.), 17 R. R. R. 415, 40 Am. & Eng. R. Cas., N. S., 415; Fisher *v.* Seaboard Air Line Ry. Co. (Va.), 15 R. R. R. 683, 38 Am. & Eng. R. Cas., N. S., 683.

†See note appended to Atchison, etc., R. Co. *v.* Willy (Kan.), 6 Am. & Eng. R. Cas., N. S., 565.

and East Hampton. The place is called "Taylor's Crossing." The railroad at this point is double tracked. The railroad runs in a straight line for a distance of 900 feet westerly of the crossing and 500 feet easterly. The highway is substantially parallel to the railroad from East Hampton to Taylor's Crossing, near which place it takes a northwesterly direction, and crosses the railroad at an angle upon the southeast of about 45 degrees. The tracks at the crossing are laid upon an embankment some 18 feet high, and for approaching the crossing from the southeast an embankment has been built in the highway commencing some 250 feet from the tracks and rising from the natural level of the highway at its commencement to the grade of the tracks. There is a similar embankment on the other side of the crossing. The highway at Taylor's Crossing is 4 rods in width, and the approach or embankment in the highway is some 25 feet in width at the top. This approach is fenced upon each side by a four-board whitewashed fence, which connects at the crossing with the cattle guard on each side. On the land adjoining the southwesterly side of the highway, for a distance of about 500 feet from the crossing, trees and shrubbery have been planted, extending to the intersection of the southerly line of the railroad right of way with the line of the highway at a point about 50 feet south of the southerly track. From this point to within 10 feet of the southerly track, trees and bushes have grown on a piece of land which lies within the limits both of the defendants' right of way and of the highway, and which is westerly of the four-board whitewashed fence on the westerly side of the approach. The trees and shrubbery on the land of adjoining proprietors and trees and bushes on the land within the defendants' right of way together form a continuous material and substantial obstruction to the view of defendants' tracks to the west and of trains approaching thereon to the traveler approaching said tracks from the southeast. On October 7, 1905, Walter G. Cowles, with Nellie F. Cowles, his wife, Richard G. Cowles, their son five years of age, and Lyde A. Keagy, sister of Mrs. Cowles, were riding in an automobile, the property of Mr. Cowles, from East Hampton to Middletown, along said main highway. At East Hampton said highway passes under said railroad, and at a point about a mile easterly of Taylor's crossing passes over said railroad, and the railroad is in plain view at frequent intervals and for considerable distances between Taylor's crossing and East Hampton, and within some 800 feet before reaching the crossing a high embankment of the railroad upon a curve toward the south is in full view from said highway, and about 300 feet nearer to Taylor's Crossing a side highway runs northerly, crossing the railroad at grade at a distance of some 300 feet, and the main highway bends northwesterly toward the railroad, intersecting it at Taylor's Crossing at a distance of about 500 feet.

At about 6 p. m. Mr. Cowles drove his automobile, which was being operated under his personal direction and supervision by his servant, upon the south track at Taylor's Crossing at the same time an express train of the defendants' passed to the east over the same track. The train was driven at the rate of 28 miles an hour, the automobile at the rate of 15 miles an hour. As a result of the collision Mrs. Cowles and her son were killed, and Lyde A. Keagy was seriously injured. The automobile was rendered useless. On October 30, 1905, Mr. Cowles was appointed administrator of the estate of his wife, and on the following February 3d as such administrator brought this action to recover damages for the injury to Mrs. Cowles alleged to have been caused by the negligence of the defendants. The defendants suffered a default and filed a written notice, in pursuance of the statute, that upon the hearing in damages they would offer evidence to disprove their negligence as alleged and to prove contributory negligence. Upon a hearing in damages the court found that the injury to Mrs. Cowles was due to the negligence of the defendants, and was also due to the negligence of Mr. Cowles, and held that the plaintiff as administrator on Mrs. Cowles' estate was entitled to recover substantial damages notwithstanding the injury to his intestate was caused by the concurring negligence of the defendants and Mr. Cowles. Thereupon the court assessed substantial damages at the sum of $5,000, and rendered judgment that the plaintiff recover that amount. The reasons assigned by the defendants in this appeal from that judgment are first, that the court based its finding of actionable negligence wholly upon an erroneous proposition of law, and that upon the facts as found by the court the alleged actionable negligence was as a matter of law disproved; and, second, in holding that the negligence of Mr. Cowles was not in legal effect equivalent to the contributory negligence of Mrs. Cowles. On the same day that this action was brought Mr. Cowles, as administrator on the estate of his son Richard G. Cowles, brought an action against these defendants to recover damages for the injury to his son. Lyde A. Keagy brought an action to recover damages for the injury to herself, and Walter G. Cowles brought an action to recover damages for his loss of the services of his wife, for the money expended by him for her medical treatment, for the loss of the services and earnings of his son, and for the injury to his automobile, alleged to be a 30-horse power car of the value of $4,000. The defendants suffered a default, giving notice of hearing in damages in each of these three cases. They were tried together with the present case, and one finding was made for the four cases. In the case brought by Mr. Cowles in his own name nominal damages were assessed, and the plaintiff ap-

pealed. In the other two cases substantial damages were assessed, and the defendants in each appealed.

John T. Robinson and *Lucius F. Robinson,* for appellants.
William Bro Smith and *Robert C. Dickenson,* for appellee.

HAMERSLEY, J. (after stating the facts). The trial court finds that the defendants were guilty of negligence in permitting the existence without cause or necessity, of trees and bushes upon their right of way which caused an obstruction to a view of the defendants' tracks by a traveler in the highway approaching the public crossing, and finds that the defendants were guilty of no other negligence than that of permitting said bushes and trees to grow within their right of way.

The essence of actionable negligence is the infringement of the legal right of another, or, in other words, the violation of a duty imposed by law in respect to another. Wilmot *v.* McPadden, 79 Conn. 373, 65 Atl. 157. The acts charged in the complaint as an infringement of the plaintiff's legal right and a violation of the defendants' legal duty in respect to the plaintiff are substantially these: (1) A careless and negligent manner of maintaining the tracks at Taylor's Crossing, so that the plaintiff could not know of the presence of said tracks or crossing until directly upon the same. The court finds that this charge is disproved; that the tracks at the crossing were laid upon a level and the iron rails could not be seen by an approaching traveler because the highway approaches said track at a considerable ascending grade; that any person traveling on the highway ought in the exercise of reasonable care to know or apprehend that he is approaching a grade crossing; and that the defendants maintained at the crossing a warning board as required by law plainly visible at a distance of at least 300 feet, which for that distance made known to approaching travelers the existence of a grade crossing. (2) Negligently, carelessly, and unskillfully operating the defendants' engine by driving the same at a high rate of speed across the highway without sounding the engine bell or whistle. The court finds this charge disproved; that the engine approached the crossing at a speed of 28 miles an hour; that the customary crossing whistle was twice sounded in the manner required by law, and the engine bell rung as the train approached the crossing. (3) Negligently and carelessly permitting bushes and trees to grow upon the land of the defendants' within its location or right of way which obscured from travelers on the highway a view of the defendants' tracks. The court finds that the defendants did, without cause or necessity, permit bushes and trees to grow upon their land which obscured from travelers on the highway a view of the tracks, and also finds that the railroad commissioners have never ordered the removal of obstructions to sight nor additions to such warning to travelers as

actually existed at said crossing. If the neglect to cut down these trees and bushes is a violation of a duty imposed by law upon the defendants in respect to travelers in the highway, then the conclusion of the court that the defendants are guilty of actionable negligence may be sustained; but, if they owe no such legal duty to travelers in the highway, then they have infringed no legal right of the defendants, and the only legal judgment upon the facts found is a judgment for nominal damages.

A difference is to be noted between the duties imposed by law upon a railroad corporation as a body politic acting as the agent of the state in pursuance of the state's directions in the establishment, construction, and maintenance of a railroad highway for a public use as well as its private profit, and as a private corporation conducting the business of a carrier of goods and passengers through the operation of cars upon the highway thus established. The former are mainly created by statute, which also determines the consequences of their violation. The latter are mainly created by force of the common law, and are similar in character and consequences of violation to those imposed by the common law upon all persons engaged in a similar business. The location and establishment of a railroad highway, as well as of other highways, is an act of state sovereignty exercised by state agents appointed for that purpose. When a railroad highway and a carriage highway intersect at a common grade, the "grade-crossing" thus formed is established by the state through its agents. A grade crossing or the condition existing by reason of such an intersection of two highways is in the nature of a nuisance, and cannot lawfully exist, unless in pursuance of state authority. State *v.* Branford, 59 Conn. 402, 405, 22 Atl. 336; New York & N. E. R. Co.'s Appeal, 62 Conn. 527, 530, 540, 26 Atl. 122. Such a subjection of public safety in the use of both highways to public convenience and necessity can only be directed by the state. When so directed, neither the railroad corporation as charged with the maintenance of the railroad highway, nor the town or other corporation as charged with the maintenance of the carriage highway, are responsible for the dangers resulting solely from such a construction of the two highways. Hoyt *v.* Danbury, 69 Conn. 341, 352, 37 Atl. 1051; Newton *v.* New York & H. R. Co., 72 Conn. 420, 429, 44 Atl. 813. At the time of such a construction, or at any time thereafter, the state may order these corporations as its agents to alter the construction by a separation of grade or otherwise, and may impose upon them new duties in respect to the performance of which they may be made liable as far as the statute points out; but without such state action, they do not, so far as concerns the condition of the roadbed, the crossing, and of its approaches, owe any legal duty to travelers using the highway beyond the statutory duty of maintaining in safe condition the highway as

established by the state. It may well be that the railroad company as owner of land adjacent to the highway, as well as other owners of adjacent land, might by acts of commission or omission on their land somewhat lessen to travelers using the highway the dangers incident to the use of the grade crossing as authorized, and that these acts might involve so little trouble that many men would say the landowners ought to do this much for those exposed to the necessary dangers of the highway. Conceding this, it does not follow that the traveler in the highway has any legal right to the performance of such a duty by the landowner; and it can make no difference in the nature of such a duty that the railroad company and the traveler use the highway at the grade crossing at the same time, assuming the duty imposed by law upon each of exercising ordinary care in the use of the highway under such circumstances. In the present case the defendants in driving their cars over the grade crossing were in the lawful use of a public highway, but they were under a legal duty to Mr. Cowles, as well as to every traveler in the use of the same highway, to exercise ordinary care in the operation of their cars, and the nature and degree of the care was affected by all the circumstances of the case, including the nature of the approaches and the fact that the land adjacent to the highway on one side was covered with trees and bushes for a distance of 500 feet from the crossing, including 40 feet of land owned by the defendants within its location or right of way, so that an approaching traveler could not upon that side of the highway see the defendants' tracks or a train upon them until he came within a few feet of the crossing, and Mr. Cowles owed a like duty of ordinary care to the defendants. It was within the province of a trial judge to determine whether the defendants exercised ordinary care in the operation of their cars in view of these circumstances, especially of the circumstance that Mr. Cowles in approaching the crossing, in order to ascertain whether a train was in fact approaching, was confined to the sense of hearing, and could not have used that of sight to any material advantage if he had been so inclined. To this extent—that is, as affecting the nature and degree of care required of the defendant in the operation of its cars—and to this extent only, could the existence of trees upon the land of the defendants support a conclusion of actionable negligence in this case. We think that the mere neglect to cut down such trees, whether causeless or not, whether they could be cut down with slight trouble and expense or not, is not, in the absence of any statute requiring railroad companies to keep their right of way free from unnecessary obstructions to a view of their tracks and trains by persons using an adjacent highway, in itself actionable negligence. The duty of a railroad company and a traveler in respect to each other, when both are in the exercise of a lawful right to the use

of a public highway, to exercise ordinary care in that use, is a mutual legal duty by force of the common law in connection with any modifying statute that may exist. No such relative mutual duty can arise between a traveler in the lawful use of a highway and a railroad company in the lawful use and occupation of its adjacent land. Any duty to use such land for the benefit of the traveler would be one resting on the railroad company as an absolute duty not involving a reciprocal duty from the traveler, and such absolute duty does not exist by force of the common law.

Any duty (not relative and mutual but absolute) of a railroad company as an agent of the state charged with the maintenance of a railroad highway to restrict the lawful use of its land within the limits of its location or right of way in any specific manner or by the use of ordinary care, so as to minimize the dangers necessarily incident to the use by the traveling public of an adjacent highway, is not a legal duty unless made so by statute. The view of the trial court that the neglect of the defendants to cut down the trees and bushes upon their land which obstructed a view of their tracks from travelers passing on the highway was in itself a violation of the defendants' legal duty, and therefore constituted actionable negligence, finds support in some authorities. C. & E. I. R. R. Co. *v.* Tilton, 26 Ill. App. 362, 366; T. H. & P. R. R. Co. *v.* Barr, 31 Ill. App. 57, 60; 2 Thompson on Negligence, §§ 1507, 1508. The contrary view finds support in Cordell *v.* N. Y. C. & H. R. R. R. Co., 70 N. Y. 119, 26 Am. Rep. 550; Nashville C. & St. L. R. R. Co. *v.* Witherspoon, 112 Tenn. 128, 78 S. W. 1052; A. T. & S. F. R. R. Co. *v.* Hawkins, 42 Kan. 355, 22 Pac. 322; C., R. I. & P. Ry. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993; Shearman & Redfield on Negligence, § 478; Baldwin on American Railroad Law, p. 402. We have never before had occasion to discuss this question, and must therefore treat it as an open one. For the reasons above suggested, we are satisfied that, while trees growing upon land adjacent to the highway, including land owned by the railroad company, which substantially obstruct the view of a traveler approaching the grade crossing, is clearly one of the circumstances, to be considered in determining whether the railroad company exercised ordinary care in the operation of its cars at a particular time, yet the mere neglect of the company to cut down trees on its own land although proper to be considered with all the surrounding circumstances affecting the care required at that time is not in itself a violation of any legal duty the company owes to a passing traveler (unless so made by statute), and is not therefore in the absence of any other negligence a neglect which constitutes actionable negligence.

We need not now discuss the range of possible circumstances proper to be considered in determining the use of ordinary care

by a railroad company in operating its cars at a grade crossing in any instance; nor the possible precautionary measures at crossings of peculiar and exceptional danger such ordinary care may require. In this case, the finding of the court shows that the defendants did exercise ordinary care in the operation of their cars in view of the character of the crossing as it existed at the time of the accident, and the court also finds that the defendants had, without cause of necessity, permitted trees to grow upon their land within their right of way for a distance of some 50 feet from the crossing, which for that distance obstructed the plaintiff's view of an approaching train until he came within some 10 feet of the railroad tracks. It seems to us that this fact, the defendants being found guilty of no other negligence, does not constitute actionable negligence, and therefore, upon the facts found, the trial court should have assessed nominal damages.

There is error. The judgment of the superior court is set aside, and the cause remanded for the assessment of nominal damages. The other Judges concurred.

WOLF *v.* GRAND RAPIDS, H. & C. RY. *et al.*

(Supreme Court of Michigan, July 1, 1907.)

[112 N. W. Rep. 732.]

Carriers—Loss of Baggage—Actions—Evidence.—In an action against a carrier for loss of baggage, the testimony of its transfer agent, to whom plaintiff delivered it at his house that he delivered the same at its (the carrier's) freight depot, is sufficient proof that the baggage came into the custody of the carrier.

Same—Checking Baggage—Authority of Agent.—Where transfer agent with authority to check baggage checked the baggage of one who subsequently purchased a ticket, the fact that the agent violated his instructions not to check baggage for a person unless he produced a ticket was immaterial on the issue of the liability of the carrier for loss of the baggage.

Same—Liability of the Carrier.*—A carrier is liable for the loss of a passenger's baggage, unless the same was lost by an act of God or the public enemy.

Same.—The liability of a carrier for the loss of a passenger's bag-

*See foot-notes appended to Sperry *v.* Consolidated Ry Co. (Conn.), 23 R. R. R. 499, 46 Am. & Eng. R. Cas., N. S., 499; foot-notes appended to Chesapeake & O. Ry. Co. *v.* Beasley (Va.), 23 R. R. R. 168, 46 Am. & Eng. R. Cas., N. S., 168.

gage is not changed because the passenger bringing suit for the loss declared in case instead of assumpsit.

Same.—An interurban railway company operating a railroad from G. to H., and a company operating a line of boats from H. to C., advertised that they had formed a line from G. to C. They had a common agent, who sold through passenger tickets and another common agent who checked baggage through. Held to support a finding that they had entered into an arrangement for carrying passengers and baggage from G. to C., rendering them jointly liable for the loss of a passenger's baggage.

Error to Superior Court of Grand Rapids; William J. Stuart, Judge.

Action by David Wolf against the Grand Rapids, Holland & Chicago Railway and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Argued before CARPENTER, GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ.

G. A. Wolf, for appellants.
Diekema & Kollen, for appellee railway.
Grant Newell, for appellee transportation company.

CARPENTER, J. The defendant railway company operates an interurban railway from Grand Rapids to Holland, and the defendant transportation company operates a line of boats from Holland to Chicago. In the summer of 1906 these two defendants made an arrangement by which passengers and their baggage were carried from Grand Rapids to Chicago; being carried by the railway company to Holland and by the transportation company from that point to Chicago. They advertised this route as the "Grand Rapids Chicago line. Fare two dollars. Baggage checked through." July 27, 1906, plaintiff, his wife, and two children took this trip. He bought through tickets for the four. Before buying them, a transfer agent came to his residence and checked his baggage through to their destination. This baggage was never delivered, and, though plaintiff made repeated demands, no explanation was ever afforded him. He brought this suit, and recovered a verdict and judgment against both defendants.

We are asked to reverse this judgment upon several grounds, all of which relate to the proposition that the trial court should have directed a verdict in defendants' favor.

First. It is contended that there is no testimony tending to prove that the baggage ever came into the custody of either of the defendants. This contention we answer by saying that there is such testimony. That testimony was given by the transfer agent. He testifies: "These trunks I delivered at the freight

depot before 6 o'clock. If I remember right, this trunk was delivered at the freight depot before 6 o'clock."

Second. It is contended that the transfer agent had no authority to check the trunks, because at the time he checked them plaintiff had not yet procured his tickets. The testimony shows that the transfer agent had authority to check the trunks over defendants' lines from Grand Rapids to Chicago. It is true he was instructed not to check baggage unless the party desiring to have it checked produced a ticket; but this was only an instruction. It was not a limitation of his authority. If plaintiff had not subsequently purchased his tickets, a very different case would be presented. But in this case plaintiff did purchase his tickets, and did thereby entitle himself to all the rights of a passenger, one of which was to have his baggage checked. The fact that the transfer agent disregarded his instructions was an entirely immaterial circumstance; for plaintiff to have insisted upon the baggage being rechecked after he had purchased the tickets—and this was his right and duty according to defendants' contention—would have been an act of sheer folly. By purchasing the tickets plaintiff fully corrected the consequences of the mistake of the transfer agent.

Third. It is contended that there can be no recovery in this case, because plaintiff, having commenced his action in case instead of assumpsit, was bound to establish negligence, and there was no evidence of negligence. Defendants' liability in this case was that of common carriers of goods; that is, they were liable unless the goods were lost by the act of God or the public enemy. See 6 Cyc. 662; 3 Am. & Eng. Encyc. of Law (2d Ed.) 546. They do not claim that the loss came within either of these exceptions. Their liability was in no way changed because plaintiff elected to declare in case, instead of assumpsit. 1 Hutchinson on Carriers (3d Ed.) § 204; Dyke *v.* Railroad, 45 N. Y. 113, 6 Am. Rep. 43.

Fourth. It is contended that there was no evidence of such a relation between the two defendants as to make them jointly liable. The evidence proves that the two defendants had entered into an arrangement for carrying passengers and their baggage from Grand Rapids to Chicago. They advertised to the public that they had formed a Grand Rapids Chicago line. They had a common agent who sold tickets and another common agent who checked baggage. Their common agent sold plaintiff his tickets and checked his baggage. From these circumstances the jury were warranted in inferring that in the carrying of passengers and their baggage from Grand Rapids to Chicago the defendants were partners, and therefore jointly liable to plaintiff. Sun Insurance Co. *v.* Kountz Line, 122 U. S. 583, 7 Sup. Ct. 1278, 30 L. Ed. 1137; Block *v.* Railroad, 139 Mass. 308, 1 N. E. 348; Wyman *v.* C. & A. Ry. Co., 4 Mo. App. 35; 6 Am. &

Eng. Encyc. of Law, 654, 655. This case is easily distinguished from Detriot Ry. *v.* McKenzie, 43 Mich. 609, 5 N. W. 1031, and Rickerson Co. *v.* Railroad Co., 67 Mich. 110, 34 N. W. 269, and from other cases relied on by defendants. In those cases it was held that a railroad company receiving goods for a destination beyond the limits of its own line discharged its obligation when delivery was made to the connecting carrier. There the transportation companies did not, as in the case at bar, hold themselves out as united in a joint enterprise.

The judgment is affirmed.

PITTSBURG, C., C. & ST. L. RY. CO. *v.* HARTFORD CITY.

(Supreme Court of Indiana, Nov. 26, 1907.)

[82 N. E. Rep. 787.]

Injunction—Public Officers—Police Power—Scope.—Though courts will arrest an unreasonable exercise of the police power, where there is an attempt thereby to lay a burden on a subject in the enjoyment of his property, the courts recognize that there is authority within the field of legislative discretion wherein the law making power is absolute.

Railroads—Municipal Regulation—Ordinances—Validity—Reasonableness.—Where a municipal ordinance requiring a railway company to maintain electric lights where its tracks intersect streets does not fix the height of the lights, so that it will be a sufficient compliance if the lights are located at such a height that an engineer running a train over the streets will not be required to look directly toward them, the ordinance is not invalid on the ground that it impairs the efficiency of headlights on locomotives.

Commerce—Interstate Commerce—Local Regulations—Validity.*—Where a railroad was built by the authority of the state, the company, whether an interstate carrier or otherwise, must, so long as Congress does not interfere, submit to reasonable local regulations in the use of its property, and a municipal ordinance requiring it to

*For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to The People *v.* Miller (U. S.), 24 R. R. R. 280, 47 Am. & Eng. R. Cas., N. S., 280; McNeill *v.* Southern Ry. Co. (U. S.), 24 R. R. R. 285, 47 Am. & Eng. R. Cas., N. S., 285; foot-notes appended to Skipper *v.* Seaboard Air Line Ry. (S. Car.), 24 R. R. R. 307, 47 Am. & Eng. R. Cas., N. S., 307; foot-notes appended to State *v.* Thompson (Ore.), 24 R. R. R. 150, 47 Am. & Eng. R. Cas., N. S., 150; Houston & Texas Cent. R. Co. *v.* Mayes (U. S.), 24 R. R. R. 50, 47 Am & Eng. R. Cas., N. S., 50; foot-notes appended to Harrill Bros. *v.* Southern Ry. (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

maintain electric lights where its tracks intersect streets is not invalid as an interference with interstate commerce.

Municipal Corporations—Ordinances—Validity—Judicial Review.—Though the courts are open to one to challenge the validity of a municipal ordinance adopted as an attempted exercise of the police power, yet he it not entitled to a judicial hearing on the question whether the ordinance should have been passed.

Eminent Domain—Taking of Property without Just Compensation—Municipal Ordinances.†—A municipal ordinance requiring a railroad to maintain electric lights where its tracks intersect streets is not invalid as a taking of property without compensation, though it lays some expense and inconvenience on the company; the regulation being a just exercise of the police power.

Railroads—Municipal Regulation—Ordinances—Validity.—A municipal ordinance requiring a railroad company to maintain electric lights where its tracks intersect streets, adopted pursuant to Burns' Ann. St. 1901, § 5173, empowering councils to provide by ordinance that railroad companies shall maintain lights where the tracks cross streets and to provide what kind of lights the companies shall maintain, is not invalid on the ground that the municipality requires that the lighting shall be done by electricity, nor because it requires the lights to be burning for five minutes before the arrival of trains.

Statutes—General and Special Laws—Creation of Corporations.—Burns' Ann. St. 1901, § 5173, empowering the councils of cities not working under a special charter to adopt an ordinance requiring railroads to maintain lights at points where the tracks cross streets, does not create a difference in the extent of the lawmaking power granted to different municipalities, so as to come within Const. art. 11, § 13, prohibiting the creation of corporations by special act.

Railroads—Municipal Regulation—Ordinances—Validity—Definiteness—Lights at Crossings.—A municipal ordinance requiring a railroad company to maintain electric lights at points where its tracks cross streets of sufficient power to light the entire crossing, "but not to exceed the power of the electric lights used by the city," is not invalid because of the quoted phrase which merely keeps the ordinance from calling on the company to do more than Burns' Ann. St. 1901, § 5173, authorizing lights at street crossings, requires.

Same.—A municipal ordinance requiring a railroad company to maintain electric lights where its tracks cross streets of sufficient power to light the entire crossing, not to exceed the power of electric lights used by the city, and to keep the lights burning for five minutes before the arrival of each train, at all times at night when there is no moon, etc., is not so indefinite as to be invalid, but requires a light of sufficient power, not exceeding that used by the city,

†See generally foot-notes appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

to enable a traveler, of good eyesight, in the nighttime, to perceive, before going upon the crossing, the tracks at the point of intersection and the character of the way across the same.

Same.—Under Burns' Ann. St. 1901, § 5173, authorizing cities to adopt an ordinance requiring railroads running through cities to maintain lights at the points where the tracks cross streets, and declaring that cities may "provide what kind of lights" shall be maintained, a municipality may adopt an ordinance requiring a railroad to maintain a light at a street intersection.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company was convicted of violating an ordinance of the city of Hartford City, and appeals. Affirmed.

G. E. Ross, for appellant.
L. F. Sprague, for appellee.

GILLETT, J. Action by appellee against appellant for the violation of a city ordinance. The charge is that the defendant violated said ordinance "by then and there unlawfully failing, neglecting, and refusing, while operating said railway as aforesaid, to keep and maintain an electric light at a point where said tracks cross Walnut street, in said city, of sufficient power to light the entire of said Walnut Street Crossing, but not to exceed the power of the electric lights in use in said city." The ordinance requires that the company shall keep and maintain electric lights at certain points, where its tracks intersect streets in said city, of sufficient power to light "the entire of said crossings," but not to exceed the power of the electric lights used in said city, and also to keep said lights supplied with a sufficient amount of electric current, and burning for five minutes before the arrival of each and every engine and train of cars at said crossing, and until after such engine and train of cars has departed, at all times in the nighttime when there is no moon, or the moon is obscured. Appellant answered in seven paragraphs. Demurrers were sustained to the last four of said paragraphs. The fourth paragraph challenged, in general terms, the reasonableness of said ordinance. The fifth paragraph alleged that defendant was a large taxpayer in said city, and further alleged that said lights would be of no benefit to it, but for the exclusive use and benefit of those using said streets. The paragraph concluded with a charge that the requirement of the ordinance amounted to a taking of defendant's property without just compensation and without due process of law, contrary to the Constitution of the United States. The sixth paragraph set up the fact that defendant is a railroad company, organized and existing under the laws of Illinois, Indiana, Ohio, Pennsylvania, and West Virginia, and as such is a common carrier of freight and passengers be-

tween the states, and is also engaged in transporting United States mails; that it is necessary that all of defendant's locomotives drawing trains in carrying on said business should be equipped with a headlight to enable the engineman and fireman properly to perform their duties, and that the existence of an electric light at said street crossing would impair the efficiency of said headlights, and obscure and diminish, and in effect destroy, the light therefrom, and prevent the engineman and fireman from performing their duties, thus endangering defendant's trains, and the passengers and freight carried thereon. It was further alleged that an electric light would prevent persons using said crossing from seeing the light upon approaching locomotives, and would hinder and prevent defendant's servants operating said trains from seeing persons and objects along its tracks, thus increasing the danger to those using said street and incapacitating defendant from the performance of its duties as a carrier of interstate commerce and United States mails. The seventh paragraph challenges the constitutional validity of said ordinance as a taking of property without just compensation and without due process of law; and it contains the averment of fact that said ordinance was passed without affording appellant an opportunity to be heard relative thereto. The court found the facts specially, and filed conclusions of law thereon, which were adverse to appellant. A judgment against it followed, and from said judgment this appeal is prosecuted.

The constitutional objections which appellant's counsel urge to the ordinance are, for the most part, indicated by the last four paragraphs of answer. It appears to us that these questions are pretty well solved by the consideration of whether the ordinance is so far reasonable, as an attempted exercise of the police power, that the court should, under the grant of authority found in the statute then in force (section 5173, Burns' Ann. St. 1901), defer to the determination of the local legislative authority as to the expediency to its requirement. It is true that the courts will arrest an arbitrary or plainly unreasonable exercise of the police power, where there has been an attempt thereby to lay a burden upon a subject in the use or enjoyment of his property, yet, notwithstanding this, the courts recognize that, as respects the police power, there is a broad authority within the field of legislative discretion, wherein, as respects what is good and expedient, the lawmaking power is absolutely the master of its own discretion. The ordinance in question does not fix the height of the electric light, and appellant would be within the requirements of the ordinance if the light were located at such a height that the engineer would not be required to look directly toward it. This being so, we are of opinion, notwithstanding the broad allegations of the sixth paragraph of the answer, that the court knows enough of electric lighting to affirm that, at the most, there would

only be presented a question of expediency, relative to what it would be wise to do in the premises, and the mere fact that we might be of opinion that the ordinance was in some measure unsuited to the attainment of its ostensible end would not justify us in striking it down. It must be presumed that the purpose of the requirement in question is to add to the security of life and limb, and the possibility of a traveler upon the street passing unwittingly into danger at the crossing, particularly if in a conveyance, without real opportunity to safeguard himself by looking and listening, is too great to warrant us in holding that the light may not be required, even if its effect be to compel the engineer to run slowly or cautiously in approaching it.

Granting that the ordinance in question may in some degree affect interstate commerce, we are nevertheless of opinion that, as a local regulation designed to protect travelers upon the street, it was competent to establish the same. The railroad was built by the authority of the state, and, whether an interstate carrier or otherwise, the company must, so long as Congress does not interfere, submit to reasonable local regulations in the use of its property. Any other holding would substitute government by a board of directors for government by the representatives of the people. It was said in Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, that it is "within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns, with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and generally with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid." In Hennington *v.* Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166, the federal Supreme Court upheld, against an interstate railroad, a statute of the state of Georgia forbidding the running of freight trains on Sunday. In Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 288, 19 Sup. Ct. 465, 43 L. Ed. 702, that court upheld the right of the state to promote the convenience of local passengers by requiring all railroads to stop three trains a day (should so many be run) at all cities or towns in the state of more than 3,000 inhabitants. In that case the court said: "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation

of interstate commerce. It was for the state to take into consideration all the circumstances affecting interstate travel within its limits, and, as far as possible, make such regulations as were just to all who might pass over the road in question. * * * Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interest of stockholders, and without taking into consideration the interests of the general public." It was further held in that case that the statute authorizing railroad companies to carry United States mails did not prohibit the enactment of reasonable police regulations by the state. See, also, Village of St. Bernard *v.* Railway Company, 4 Ohio S. & C. P. Dec. 371; note to People *v.* Chicago, etc., R. Co., as reported in 7 Am. & Eng. Anno. Cases, 1. Of course, the courts are open to appellant to challenge the validity of the ordinance as an attempted exercise of the police power, but, as the act was one of a legislative character, and was not judicial, appellant was not entitled to a hearing on the question whether the ordinance should be passed. The ordinance does not amount to a taking of property without just compensation. The regulation being a just exercise of the police power, appellant must submit to the requirement, even though it lays some expense or inconvenience upon it. There it too large a body of legislative regulations of this character which have received judicial sanction by the highest courts to make the proposition a debatable one. The mere fact that the General Assembly has seen fit to give the common council the power to prescribe the character of the light—with respect to its being electrical or otherwise—and that the latter body has required that the lighting shall be done by electricity, affords no sufficient ground for an overthrow of the ordinance. As was said in Missouri, etc., R. Co. *v.* May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971: "Great constitutional principles must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that Legislatures are ultimate guardians of the liberties and welfare of the people in quite as large a degree as the courts." Nor does it appear to us that the common council exceeded its authority in requiring the light to be burning for five minutes before the arrival of a train. Such a provision as to the time that the light shall be burning is a very moderate one, and can well be defended on the ground that it is calculated to make it more certain that the duty will be performed.

The validity of the statute is questioned, in that it purports to be a grant of power to all cities not operating under a special charter. We may grant that this makes the statute special in its character, but from this it does not follow that it is invalid. As long as the legislation is not of a character sufficiently radical to amount to the creation of a municipal corporation, within the

prohibition of section 13 of article 11 of the state Constitution, we know of no constitutional provision, federal or state, which is offended by a mere difference in the extent of lawmaking power which is granted to different cities or towns. As applied to the statute in question, it may be said that each street and railroad intersection presents its own considerations for the determination of the municipal Legislature, and it is no discrimination that such power is not given to every city, or that every such intersection in the state is not ordered lighted.

It is contended by appellant's counsel that the ordinance is within the condemnation of Chicago, etc., R. Co. *v.* Town of Salem, 166 Ind. 71, 76 N. E. 631, because of the provision that the power shall not exceed that of the lights used by the city. In that case there was no standard fixed, except the shifting standard of the lights which the city might from time to time use, and it was held unreasonable to enforce by penalty a requirement that would compel the company to take notice of changes dehors the ordinance. Here the requirement is that the light shall be "of sufficient power to light the entire of said Walnut street crossing." And the limitation thereon is designed merely to keep the ordinance from calling on the company to do more than the statute authorizes. In other words, if such limitation were not found in the words of the ordinance, it would still be subject to the statute. We are of opinion that in this respect the case is ruled by Chicago, etc., R. Co. *v.* City of Crawfordsville, 164 Ind. 70, 72 N. E. 1025. The ordinance is not so indefinite in its requirement as to be invalid. Upon the hearing of such a case, it would be the duty of the court to construe the ordinance, and we are of opinion that its legal effect is to require a light of sufficient power (not exceeding that used by the city) to enable a traveler, of good eyesight, in the nighttime, to perceive, before going upon the crossing, the tracks at the point of intersection and the character of the way across the same. While it may be that a light of greater power than this might be required by the city, yet, as a matter of legal construction, any uncertainty must cut down the operation of the ordinance until it be brought within the limits of the clear requirements of the provision, and, when so construed, it must be said that the standard of duty is definite. See Chicago, etc., R. Co. *v.* City of Crawfordsville, *supra.*

We regard the complaint as sufficient. The statute specifically authorizes the city by ordinance or resolution to "provide what kind of lights the railroad company shall maintain," and, as a proper means to an authorized end, we are of opinion that it was proper for the common council to direct that a light be located at the street intersection. There is no available error in the record.

Judgement affirmed.

CARDWELL *v.* NORTH CAROLINA R. CO.

(Supreme Court of North Carolina, Nov. 27, 1907.)

[59 S. E. Rep. 673.]

Carriers—Carriage of Goods—Delay in Transportation—Statutory Provisions—Constitutionality.*—Revisal 1905, § 2632, which provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transportating goods, is constitutional, as a valid exercise of the police power.

Same—Parties—"Party Aggrieved."—Revisal 1905, § 2632, provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods. Plaintiff sold goods to one at a distant point, delivered them to the carrier, and received a bill of lading therefor. Delivery at the buyer's home was a part of the contract of sale. Held, that plaintiff, and not the consignee, was the "party aggrieved" by the unreasonable delay, since the plaintiff is the one whose legal right is denied.

Same—Evidence.—In an action under Revisal 1905, § 2632, it is not relevant to the inquiry whether or not defendant knew the facts which gave plaintiff the right to sue.

Appeal from Superior Court, Alamance County; O. H. Allen, Judge.

Action by one Cardwell against the North Carolina Railroad Company for the value of goods and the penalty for delay in transportation. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action, tried on appeal from the court of a justice of the peace. There was evidence tending to show that plaintiff had sold to one M. J. Blue a package of harness worth $24.50, to be delivered at Efland, N. C., the stipulation as to delivery at Efland being a part of the contract of sale. The plaintiff had same shipped by defendant company from Burlington, N. C. to Efland, N. C., prepaying the freight charges, and taking a bill of lading therefor as shipped to M. J. Blue; that defendant failed to transport and deliver said harness within ordinary time in accordance with the contract, and plaintiff, having made good the loss to the purchaser, M. J. Blue, by supplying him with other harness, filed his claim, as required by the statute, and institute this action to recover for the loss of the harness, and for the penalty for wrongfully failing to transport freight, allowed by section 2632, Revisal 1905. Under the charge of the court, there was verdict for plaintiff for the value of the goods and the pen-

*See foot-notes appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

alty, judgment on the verdict, and defendant excepted and appealed.

Brooks & Thompson and *W. H. Carroll,* for plaintiff.
King & Kimball and *Parker & Parker,* for defendant.

HOKE, J. (after stating the facts as above). The statute has been upheld as a constitutional enactment in Walker's Case, 137 N. C. 163, 49 S. E. 84, Stone's Case, 144 N. C. 220, 56 S. E. 932, and other decisions of like import, and the principle upon which it rests has been affirmed in Efland's Case (defendant's appeal, at the present term) 59 S. E. 355. It is chiefly urged for error by appellant that plaintiff is not the "party aggrieved" under the principle announced in Stone's Case, *supra,* in that it was held: "When goods are delivered to a common carrier for transportation and bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue as the 'party aggrieved' for the penalty given by section 1467, Revisal 1905." This is undoubtedly a correct decision, applying, as stated, where it appears that goods are shipped and bill of lading taken to a consignee without more. As indicated in the opinion, however, where the facts show, as in this case, that from the attendant circumstances or the terms of the agreement some person other than the consignee is the one whose legal right is denied and who is alone interested in having the transportation properly made, a different rule obtains, and the case comes within the principle of Summer's Case, 138 N. C. 295, 50 S. E. 714. In that opinion it was said: "In giving the penalty to the party aggrieved, the statute simply designates the person who shall have the right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered. 'The party aggrieved is the one whose legal right is denied.'" Nor is it a valid objection to this recovery that defendant may not have been made aware of the facts which gave to plaintiff the right to sue as the "party aggrieved" under the statute. As shown in case of Rollins *v.* Railroad (at the present term) 59 S. E. 671, neither the issue as to defendant's actual knowledge, nor the evidence tending to support it, are, as a general rule, relevant to the inquiry. In the absence of any counterclaim or offset in favor of defendant against the person who as consignee appears to be the "party interested" under the contract, if the case is tried and determined in accordance with law, and in a way to protect defendant from a second recovery, it is not material whether the real party in interest was known to defendant or not.

We are of opinion that the authorities referred to are decisive against the defendant's position, and we find no error in the proceedings below that gives appellant any just ground of complaint.

No error.

ILLINOIS CENT. R. CO. *v.* JENNINGS.

(Supreme Court of Illinois, Oct. 23, 1907.)

[82 N. E. Rep. 403.]

Appeal—Objections in Intermediate Court.—Where the trial judge resigned before signing the bill of exceptions, which was thereafter signed by one of his associates, and not his successor, and the record shows that this irregularity was in no manner presented to the appellate court, a motion that questions arising upon the bill should not be considered on account of the irregularity in signing will not be entertained on appeal to the Supreme Court.

Carriers—Contributory Negligence—Acts by Direction of Carrier's Employees.*—Plaintiff's testimony that the conductor was in charge of the train, and was giving orders in connection therewith, and had authority over the train, and went with plaintiff to the engine, does not show authority on the part of the conductor to waive a written contract providing that plaintiff "shall, while the train is in motion, ride in the caboose attached to the train conveying the stock," since, to prove such a waiver, it rested on plaintiff to affirmatively show that it was within the apparent scope of the conductor's authority to waive the benefit of the contract, and that plaintiff did not know or have reasonable grounds to believe that the conductor was exceeding his authority.

Same.—A conductor of a freight train does not, by virtue of his employment, have authority, either real or apparent, to permit passengers upon a train to ride upon the engine under any ordinary circumstances.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Marion County; William M. Farmer, Judge.

Action for personal injuries by Frank E. Jennings against the Illinois Central Railroad Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. W. Barr, R. I. Stephens, and *F. M. Youngblood* (*J. M. Dickinson,* of counsel), for appellant.

C. E. Jennings, Frank F. Noleman, and *W. F. Bundy,* for appellee.

*For the authorities in this series on the subject of the authority of the carrier's employees to waive the conditions of contract for the transportation of passengers, see foot-notes appended to Bussey *v.* Charleston & W. C. Ry. Co. (S. Car.), 24 R. R. R. 460, 47 Am. & Eng. R. Cas., N. S., 460; foot-notes appended to Illinois Cent. R. Co. *v.* Jennings (Ill.), 20 R. R. R. 15, 43 Am. & Eng. R. Cas., N. S., 15.

SCOTT, J. This is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment of the circuit court of Marion county, recovered by the appellee against appellant in an action on the case for personal injuries sustained by appellee while riding on one of appellant's frieght trains. After the trial in the circuit court, and before the bill of exceptions was signed, the circuit judge before whom the case was tried resigned, and the bill of exceptions was thereafter signed by one of his associates, and not by his successor; and appellee urges that questions which arise upon the bill of exceptions should not, for that reason, be considered. This matter should have been presented in the Appellate Court, by a motion to strike or otherwise. It does not appear by the abstract that this course was pursued, and for that reason the point will not be considered here.

This case was once before in this court, and was disposed of at the October term, 1905. The opinion then rendered is found in 217 Ill., at page 140, 75 N. E., page 457. Following judgment by this court, the case was again tried in the circuit court upon the same pleadings, and the evidence upon the second trial in that court was substantially the same as upon the first trial, except with reference to one matter, which will hereinafter be discussed. The averments of the pleadings and the facts as shown by the evidence, with the exception just noted, may be ascertained by reference to the former opinion of this court. It is therefore unnecessary to restate them here. Upon the last trial in the circuit court each party offered additional evidence for the purpose of showing to the jury whether the conductor had authority, or apparent authority, to waive and modify the contract by virtue of which appellee was a passenger on the train, and which provided that he "shall, while the train is in motion, ride in the caboose attached to the train conveying the stock." Appellant offered evidence, which was not disputed, from which it appears that the conductor did not, in fact, as between himself and his employer, have the right to alter this contract or to waive the provision just quoted. Appellee, for the purpose of showing that the conductor had the apparent authority to permit or direct him to ride upon the engine notwithstanding the contract above quoted, testified as follows: "He was at the time conductor in charge of the train. He was giving orders in connection with the train. I went with him to the engine. I went, because he commanded me to go. He said we would ride on the engine to Pana. He was in charge of the train, and I did not know of anything else to do. He had authority over the train." At the close of all the evidence appellant moved the court to instruct the jury to return a verdict in its favor, and the denial of this motion is assigned as error.

When the case was first tried the court took from the jury the

question of the conductor's authority, or apparent authority, to modify or change the contract, by instructing the jury that, if the conductor invited or requested the plaintiff to ride on the engine, the provision of the contract in regard to riding in the caboose while the train was in motion was thereby waived. The instructions to that effect were held to be erroneous by this court; but there was no holding, and no intimation in our opinion, as appellee seems to think, that the evidence in the case was sufficient to sustain a verdict against the appellant, had it been returned by the jury under proper instructions. It was expressly pointed out that "it rested upon the plaintiff to affirmatively show that it was within the apparent scope of the authority of the conductor to waive the benefit of the contract, and that he [appellee] did not know or have reasonable grounds to believe that the conductor was exceeding his authority." Appellee's contract expressly obligated him, if he traveled upon the train, to ride in the caboose. Appellee's testimony to the effect that the conductor was in charge of the train, and was giving orders in connection with the train, and had authority over the train, does not tend to show that the conductor had apparent authority to alter the written contract, or waive the provision thereof by which appellee was required to ride in the caboose. This evidence of the appellee tends only to show that this conductor had the same apparent authority that every conductor has upon every train, and, if it could be said that it tended to show that the conductor has the right to alter or waive the provisions of the written contract, then, if the passenger did not know whether the conductor had authority to waive or alter the provisions of the contract, there would be no practical difference in the situation of the carrier in a case where the conductor did not, in fact, have authority to alter or waive the contract, and one in which he did have that authority, because, in every instance where he did not have the authority, indisputable evidence tending to show that he had apparent authority of that character could be introduced, by showing that he was engaged in the performance of the ordinary duties of a conductor, which, in practice, would leave the carrier in the same position as though the conductor, in fact, had the power to change or waive the contract.

A conductor of a freight train does not, by virtue of his employment, have authority, either real or apparent, to permit passengers upon a train to ride upon the engine under any ordinary circumstances. 4 Elliott on Railroads, §§ 1580, 1632; Thompson on Negligence, § 2943. In the existence of an emergency, as where, for instance, there was no caboose in the train, the rule might, perhaps be otherwise. The language in Chicago & Alton Railroad Co. *v.* Michie, 83 Ill. 427, relied upon by appellee, was not necessary in the decision of that case; and the court, in us-

ing it, evidently did not have in mind a case where the passenger was bound by an express contract to ride only in the car provided for carrying passengers. There is no proof in the present record which tends to show that appellee was rightfully upon the engine, and, if he was not rightfully there, appellant owed him no duty, except to refrain from wantonly or willfully injuring him. The jury should have been directed to return a verdict for the defendant.

The judgment of the Appellate Court and the judgment of the circuit court will be reversed, and the cause will be remanded.

Reversed and remanded.

FARMER, J., took no part in the decision of this case.

MERRYMAN *v.* CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Iowa, Oct. 21, 1907.)

[113 N. W. Rep. 357.]

Carriers—Passengers—Duty to Light Platforms.*— Railroad companies must use reasonable and ordinary care to light their platforms so that passengers may enter and leave trains with reasonable safety.

Same—Questions for Jury.—In an action against a railway company for injury to an alighting passenger, the question whether the station and platform were sufficiently lighted is ordinarily for the jury.

Same—Duty to Provide Steps.†—When a station platform is so much below the level of the lower steps of the car as to make it unsafe for passengers to alight without an intermediate stool or steps, the carrier must provide one, but need not assist the passengers in alighting.

Same—Alighting at Intermediate Stations.†—Railway stations must be reasonably safe, both as to platform and light, for any passenger who may see fit to leave the train, whether the passenger has reacned his ticketed destination or not.

Same—Action for Personal Injury—Evidence.‡—In an action

*See foot-notes appended to Illinois Cent. R. Co. *v.* Cruse (Ky.), 21 R. R. R. 145, 44 & Eng. R. Cas., N. S., 145.

†For the authorities in this series on the subject of the care required of a carrier of passengers in regard to the safety of stations, platforms, and other stopping places, see foot-notes appended to Crowe *v.* Michigan Cent. R. Co. (Mich.), 24 R. R. R. 191, 47 Am. & Eng. R. Cas., N. S., 191; Mobile L. & R. Co. *v.* Walsh (Ala.), 24 R. R. R. 114, 47 Am. & Eng. R. Cas., N. S., 114; Pincus *v.* Atlantic Coast Line R. Co. (N. Car.), 24 R. R. R. 112, 47 Am & Eng R. Cas., N. S., 112; foot-notes appended to Farrell *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408.

‡See note, 19 R. R. R. 321, 42 Am. & Eng. R. Cas., N. S., 321.

against a railway company for negligent injury to an alighting passenger, the company cannot show that some of the passenger's party alighted without accident.

Appeal from District Court, Taylor County; H. M. Towner, Judge.

Suit to recover damages for a personal injury. Judgment for the plaintiff, from which the defendant appeals. Affirmed.

Carr, Hewitt, Parker & Wright and *W. E. Miller,* for appellant.

William M. Jackson and *D. W. Higbee,* for appellee.

SHERWIN, J. The plaintiff with her husband and their neighbors held tickets for passage on the defendant's road from Des Moines to Diagonal, Iowa. They arranged by wire to have livery conveyances meet them at Diagonal to carry them to Clearfield, Iowa, where they resided. Knowlton is a small passenger station on defendant's road between Des Moines and Diagonal, and distant about one mile from the latter place. There were no passengers scheduled to get off at Knowlton the night in question, and no passengers got on the train there that night. The train stopped at Knowlton according to custom, and soon thereafter some member of plaintiff's party noticed through the car window that the liverymen whom they expected would meet them at Diagonal had instead, come to Knowlton, and were waiting there. Plaintiff, her husband, and neighbors immediately proceeded to leave the train at Knowlton without notifying any of the trainmen of their purpose so to do. There was a cinder platform at this station, and in stepping from the lowest car step to the platform the plaintiff received the injury for which she seeks recovery. She alleges in her petition that the place where passengers were invited to get on and off of the car in which she had been riding was not sufficiently lighted; that the place where persons were required to enter and leave the said car was too low for the reasonable safety of its passengers; and that the defendant and its employees were negligent in not providing a step or stool for the use of passengers desiring to leave said train. It is further alleged that the employees of the defendant were negligent in not assisting the plaintiff from the train, and were further negligent in not lighting the exit from the said car, and the steps thereof with their lanterns. The appellant insists that its motion for a direct verdict should have been sustained because the evidence does not show that it was in any manner negligent; that it was operating its train in the usual and ordinary manner, exercising every proper precaution for the safety of the plaintiff as a psssenger thereon. The court directed the jury that the defendant was not required, and was under no obligation, to personally assist the

plaintiff to alight from the train at Knowlton, unless notified or requested so to do by the plaintiff; and, as it was conceded that no such notification or request was made, the question of the defendant's negligence in not so assisting the plaintiff, was eliminated from the case and need receive no further consideration.

That the plaintiff was a passenger and had the right to get off of the train at Knowlton is not questioned by the appellant, and it is further conceded that she was at the time entitled to all of the care exacted by the law for the safety and convenience of passengers. The law requires railroad companies to exercise reasonable and ordinary care to light their platforms so that passengers may enter and leave trains with reasonable safety. Hutchinson on Carriers, § 936; Hiatt *v.* D M. N. & W. Ry. Co., 96 Iowa, 169, 64 N. W. 766; Moore on Carriers, 612, 613; 3 Thompson on Negligence, § 2691. The question whether the station and platform were sufficiently lighted is ordinarily one of fact for the jury. Hiatt *v.* Railway Co., *supra*. It is also the duty of railway carriers to provide reasonably safe platforms for the use of passengers in boarding and leaving their trains. McDonald *v.* Chicago N. W. R. Co., 26 Iowa, 124, 95 Am. Dec. 114; 3 Thompson on Negligence, § 2688. And when the station platform is so much below the level of the lower steps of the car as to make it unsafe for passengers to alight without an intermediate stool or step, it is the duty of the carrier to provide such step. Toledo, etc., R. Co. *v.* Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289; Missouri, Kansas & Texas R. Co. *v.* Buchanan, 31 Tex. Civ. App. 209, 72 S. W. 96.

The duty to furnish a safe platform, and a step or stool whenever the same is necessary to make it safe, does not necessarily include the duty to assist alighting passengers. The step is simply a helpful instrument which requires no personal attendance, while the duty to assist includes the personal element. This distinction was made clear by the instruction given, and the court properly refused those asked by the defendant which stated a different rule. It being the law that passengers may rightfully get off of trains at intermediate stations, must follow that such stations must be reasonably safe, both as to platform and light, for any passenger who may see fit to leave the train; and the mere fact that the defendant supposed that the plaintiff would not permanently leave the train until her ticketed destination was reached can make no difference in its duty in this respect. In our judgment the petition sufficiently charged negligence in not furnishing safe means for leaving the car in question, and the issue was properly submitted to the jury. There was also sufficient evidence on both issues to take the case to

the jury, and on the issue of contributory negligence, and the court rightly refused to direct a verdict for the defendant.

The appellant's various contentions for error center around the propositions already discussed, and we need not more specifically notice the others relating to the main qusetion. There was no error in rejecting testimony to the effect that some of the plaintiff's party alighted from the car without accident. A thousand passengers might safely get off of a train where there was no platform, or when the platform and station were insufficiently lighted, and such fact would not lessen the duty of the defendant in respect thereto. The legal duty imposed is to provide a reasonably safe exist for all passengers, and not for particular classes of persons.

The judgment is affirmed.

Affirmed.

BALDWIN *v.* SEABOARD AIR LINE RY. CO.

(Supreme Court of Georgia, July 9, 1907.)

[53 S. E. Rep. 35.]

Carriers—Carriage of Passengers—Wrongful Expulsion.*—A passenger on a railway train who had paid his fare to a given city, which was under quarantine regulations, and who, when near the end of his journey, left the train at a station on the railway line, in obedience to the order of a quarantine or health officer, who told him that he would not be allowed to ride on the train into the city, but must leave it at that station, has no cause of action against the railway company for a wrongful expulsion from its train, although the conductor pointed him out to the health officer, and, after knowledge of such officer's order to the passenger, did not interfere to prevent its execution.

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; W. A. Little, Judge.

*See foot-notes appended to Gallegly *v.* Kansas City, etc., R. Co. (Miss.), 10 R. R. R. 272, 33 Am. & Eng. R. Cas., N. S., 272; Schmidt *v.* New Orleans Ry. Co. (La.), 24 R. R. R. 156, 47 Am. & Eng. R. Cas., N. S., 156; Texas Midland R. R. *v.* Dean (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596; Mason *v* Illinois Cent. R. Co. (Ky), 10 R. R. R. 287, 33 Am. & Eng. R. Cas., N. S., 287 (duty of those in charge of trains to obey regulations of board of health, etc.); St. Clair *v.* Kansas City, M. & R. R. Co. (Miss.), 20 Am. & Eng. R. Cas., N. S., 426 (liability of carrier selling ticket as agent for wrongful enforcement of quarantine regulations by connecting carrier); extensive note, 6 R. R. R. 48, 29 Am. & Eng. R. Cas., N. S., 48.

Baldwin *v.* Seaboard Air Line Ry. Co

Action by Gale Scott Baldwin against the Seaboard Air Line Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Gale Scott Baldwin brought an action against the Seaboard Air Line Railway Company to recover damages. The petition made the following allegations: In September, 1905, the plaintiff purchased from the defendant, in the city of Albany, Ga., a ticket entitling him to ride on its passenger train from that city to Columbus, Ga. He boarded defendant's train at Albany, and the conductor thereof accepted his ticket for his transportation to Columbus. When the train approached Sulphur Springs, in Chattahoochee county, an agent of the defendant, who was riding on the train, notified the plaintiff that he must leave the train at that station, and that he would not be allowed to ride the remainder of the distance into Columbus; and, when the train arrived at Sulphur Springs, this agent of the defendant ordered him to leave the train, "and in obedience to said order he did so, and was not allowed by the defendant to ride any further on said train." The conductor of the train "knew that said other agent of said defendant had ordered * * * petitioner to leave said train, and, in fact, pointed out [petitioner] to said agent as a person to be ejected from said train, and failed to interfere and prevent the said agent from ejecting" him. By reason of his ejection from the train, the petitioner was put to great inconvenience and trouble, and subjected to great personal annoyance, and was compelled to walk a long distance to another railroad for the purpose of getting to his destination. The expulsion of petitioner from the train was with the consent and approved of the conductor, who failed and refused to protect him, and such expulsion was without fault on the part of petitioner. When petitioner applied at the office of defendant in Albany for a ticket from that place to Columbus, Ga., he was notified by the ticket agent that, before purchasing a ticket, it would be necessary for him to have a health certificate. Petitioner thereupon "applied to the health officer in the city of Albany, and produced evidence to show that he was in good health, and had not been exposed during the 10 days preceding said date to the infection of yellow fever, and had not been in any infected or suspected locality for 10 days, and * * * procured from said health officer the certificate," which he alleges was in due form, and a copy of which he attaches to his petition. He exhibited this certificate to the ticket agent of defendant, and thereupon the agent sold him the ticket from Albany to Columbus. When he was approached "by the said officer who expelled him from said train, * * * and asked for a health certificate, he produced said certificate and exhibited the same to said officer and to said conductor," and "it was the duty of said conductor and said officer to have passed him on said certificate into the city of Columbus, and his expulsion from

said train, as hereinbefore set forth, was wrongful and unjustifiable," and he has thereby been injured and damaged in the sum of $2,000. A copy of the health certificate in question was set forth in petition. The petition was demurred to upon various grounds, and the petitioner thereupon, with leave of the court, amended it. The amendment alleged: The person who notified petitioner that he must leave the train at Sulphur Springs and that he would not be allowed to ride thereon into the city of Columbus, and who, when the train arrived at Sulphur Springs, ordered him to leave it, claimed to act as a quarantine officer, but was unknown to petitioner, who "does not admit" that this person was a quarantine officer. The person "claiming to act as a quarantine officer" ordered petitioner to leave the train, "notwithstanding the fact that [he] exhibited to said person and to said conductor his health certificate as set out in full" in the original petition, "which entitled him to ride on said train into the city of Columbus." The "conductor negligently refused to interpose in any way to prevent * * * petitioner from being removed from said train by said person, but, on the contrary, pointed out * * * petitioner to said person and thereby assisted him in removing * * * petitioner from said train." The conductor "made no effort whatever to protect * * * petitioner, or to induce said person not to remove * * * petitioner from said train, as it was his duty to do under the circumstances, but allowed him to be ejected from the train, contrary to law." After the allowance of this amendment the defendant renewed its original demurrer, and demurred upon other grounds. One of the grounds of the demurrer was that the allegations of the petition were insufficient to set forth a cause of action. Other grounds (which were but amplifications of the general demurrer) were: "Because it is apparent from said petition that the alleged 'agent' or 'officer' ordering plaintiff from the train was a quarantine agent or officer of said state, or some duly constituted municipal authority thereof, and was not an officer or agent of defendant, nor subject to its control or direction. * * * It appears, by reasonable inference, that the person alleged to have ordered plaintiff off the train was an officer of said state or some duly constituted municipality thereof, acting within the scope of his authority or apparent authority and independently of defendant and its agents, and that defendant and its agents were without power or authority to control or interfere with said officer." The court sustained the demurrers and dismissed the petition, and the plaintiff excepted.

W. R. Hammond, for plaintiff in error.
Goetchins & Chappell, for defendant in error.

FISH, C. J. (after stating the facts). We think the plaintiff's petition clearly indicates that at the time of the occurrence of

which he complains quarantine regulations were in force with reference to travelers seeking to enter the city of Columbus, at least as to such travelers coming from Albany, Ga. The petition shows that, before the plaintiff purchased his ticket, he was put on notice of the existence of such regulations by the agent of the defendant to whom he applied to purchase the ticket, as the agent notified him "that, before purchasing the same, it would be necessary for him to have a health certificate." In order to procure such a certificate from the Albany health officer, the plaintiff had to produce evidence to show that he had not within the past 10 days been exposed to the infection of yellow fever, nor been in any infected or suspected locality. As the train upon which he was riding approached the city of Columbus, an officer, claiming to be a quarantine officer, approached him and asked him for a health certificate, and plaintiff exhibited the one which he had procured in Albany to such officer, who told plaintiff that he would not be allowed to ride on the train into Columbus, but must leave it at Sulphur Springs. These facts alleged in the petition clearly indicate the existence of quarantine regulations; and when to them are added the allegations that plaintiff's health certificate "entitled him to ride on said train into the city of Columbus," and that it was the duty of "said officer to have passed him on said certificate into the city of Columbus," it seems impossible to fairly construe this petition without reaching the conclusion that there were such regulations in force relative to persons traveling from Albany to Columbus, Ga. The petition shows that, before the plaintiff purchased his ticket, he had every reason to suspect that ere he reached his journey's end he would encounter a quarantine officer, and that he relied both on his railroad ticket and his health certificate for his entry into the city of his destination. While in the amendment to the petition the plaintiff was careful to allege that he did not admit that the person who ordered him to leave the train at Sulphur Springs was what such person claimed to be, a quarantine officer, yet not only do the circumstances alleged in the petition strongly tend to indicate that this was true, but, as we have seen, the plaintiff himself alleges that it was the duty of "said officer to have passed him on said certificate into the city of Columbus." The allegation that it was the duty of said officer to have passed the plaintiff into the city of Columbus on the health certificate which he exhibited for the officer's inspection is equivalent to an admission that such officer was a quarantine officer. Unless he was a quarantine officer, how could it have been his duty to pass the plaintiff into the city of Columbus upon the evidence as to his right to enter that city afforded by the health certificate? The allegation here referred to was a direct admission that the person who ordered the plaintiff to leave the train was an "officer" of some kind, and an indirect admission that he was

a quarantine or health officer, else it could not have been his duty "to have passed" the plaintiff "into the city of Columbus" upon his health certificate. Against this clearly implied admission in the original petition, we have the allegation, in the amendment thereto, that plaintiff does not admit that the person who ordered him from the train was a quarantine officer; but he did not deny that such was the fact. The matter, then, stands thus: An officer, whose duty was such as to clearly indicate that he was a quarantine or health officer, ordered the plaintiff to leave the train, but the plaintiff neither expressly admits nor denies that such officer was a quarantine officer. As the rule is well established that pleadings are to be construed most strongly against the pleader and the allegation from which the admission is implied was not stricken from the original petition, the plaintiff could not escape its force and effect by merely alleging that he did not admit the natural and logical deduction from such allegation. While, by an amendment to the original petition, the plaintiff could have withdrawn an allegation previously made, he could not by an amendment place his own construction upon the facts which he had alleged.

After all, however, it does not really make any difference by what particular name the officer who ordered the plaintiff to leave the train be called, if his duty was such as the plaintiff alleges it to have been. He must have been a health officer, clothed with authority to pass upon the sufficiency of health certificates to entitle the holders thereof to enter the city of Columbus, otherwise it could not have been his duty to pass the plaintiff into that city upon the health certificate which he exhibited for inspection. If he was not clothed with such authority, he owed the plaintiff simply the negative duty of noninterference with his liberty, and could not have owed him the positive duty of passing him into the city of Columbus because he had exhibited a proper health certificate. A health officer who had authority to pass upon the sufficiency of plaintiff's health certificate to entitle him to enter Columbus had also, by necessary implication, authority to prevent him from entering such city, if the certificate, under the health regulations in force, was not such as to entitle him to do so. The case, then, resolves itself into this question: Was it the duty of the conductor to interfere to prevent a health officer, clothed with such authority, from compelling the plaintiff to leave the train before it reached the city of Columbus? Brunswick & Western Railroad Co. *v.* Ponder, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152, is a case which is directly in point here. There it was held: "A railroad company is bound to use extraordinary diligence to protect a passenger while in transit from violence or injury by third person; but, where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest."

In the present case the conductor was not bound to contest with the health officer the propriety or legality of the exercise of his power and authority in the particular instance; as the sufficiency of the health certificate was a question for the health officer, and not for the conductor. A railroad conductor is not required, for the protection of one of his passengers, to enter into a contest with, or put himself in opposition to, an officer of the law, who is apparently acting within the scope of his authority. Burnswick & Western R. Co. *v.* Ponder, *supra,* Duggan *v.* Baltimore & Ohio R. Co., 159 Pa. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672; Fetter on Carriers of Pas. § 101.

While the petition alleged that the conductor pointed the plaintiff out as a person to be ejected from the train, there is no averment that the conductor said why he pointed out the plaintiff to the health officer, or that he did anything whatever to indicate why he did so. As an allegation of fact, therefore, this statement simply amounts to an averment that the conductor pointed the plaintiff out to the officer who ordered him to leave the train; the alleged purpose of the conductor in pointing him out being a mere conclusion of the pleader. The conductor had a perfect right to point out to the health officer the passengers on the train who had boarded it at a given city or locality. For instance, if the health officer asked the conductor to indicate to him the passengers who had held tickets for Albany, and the conductor did so, he would not thereby render the railroad company responsible for the subsequent official conduct of such officer to such passengers, or any of them. He would be merely giving information to which the health officer, as a matter of public policy, was intended. It was held in Owens *v.* Wilmington & Weldon Railroad Co., 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642, that "a railroad company is not liable for the false arrest of a passenger on one of its trains where the conductor in charge of the train merely pointed out such passenger to a sheriff who had come to arrest him as a party suspected of a capital offense." In that case the court said: "The defendant was wholly ignorant of the occurrence, and its conductor did not originate the cause or instigate or participate in the arrest. It would be vain and unreasonable to reqiure him to resist an officer of the law, or the law itself. Whether the officer had authority or probable cause for making the arrest is immaterial.

In the case with which we are dealing the court properly dismissed the petition upon demurrer, and the judgment is therefore affirmed. All the Justices concur.

CENTRAL OF GEORGIA RY. CO. *v.* CITY MILLS CO.

(Supreme Court of Georgia, Aug. 9, 1907.)

[58 S. E. Rep. 197.]

Carriers—Carriage of Goods—Limitation of Liability.*—A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipt given or tickets sold. He may make an express contract releasing him from liability not arising from his negligence, and will then be governed thereby.

Same.—A milling company, which did a large amount of shipping over a railroad, with the assent of the railroad company prepared and had printed for itself a blank form of shipping receipt, which included the words, "as per conditions of the company's bill of lading." The agent who prepared the form testified that he intended to make it subject to the conditions in the company's regular bill of lading; that the meal which was involved in the controversy was loaded on a car by the milling company, and the receipt made out by its agent and presented to the agent of the railroad company for signing; that it was his intention, as representing the milling company, in making out every paper or contract of shipment, that it should be subject to the terms and conditions of the company's standard bill of lading; and that it was so expressed in the paper, and so understood by him, but that he had never read one of the bills of lading, although he had seen thousands of them. One of the conditions contained in the

*For the authorities in this series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its printed conditions, see note appended to Singer *v.* Merchants' Despatch Co. (Mass.), 24 R. R. R. 83, 47 Am. & Eng. R. Cas., N. S., 83; foot-notes appended to Allen, etc., Co. *v.* Canadian Pac. Ry. Co. (Wash.) 24 R. R. R. 75, 47 Am. & Eng. R. Cas., N. S., 75; foot-notes appended to Hayes *v.* Adams Express Co. (N. J.), 23 R. R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506; foot-notes appended to Hayes *v.* Adams Express Co. (N. J.), 22 R. R. R. 506, 45 Am. & Eng. R. Cas., N. S., 506; Baltimore & O. R. Co. *v.* Doyle (C. C. A.), 24 R. R. R. 129, 47 Am. & Eng. R. Cas., N. S., 129.

For the authorities in this series on the question whether a common carrier can limit its liability by contract, see foot-notes appended to Adams Express Co. *v.* Walker (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145; Arthur *v.* Texas & Pac. Co. (U. S.), 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583; Chesapeake & O. Ry. Co. *v.* Beasley, Couch & Co. (Va.), 23 R. R. R. 168, 46 Am. & Eng. R. Cas., N. S., 168; foot-notes appended to Denver & R. G. R. Co. *v.* Whan (Colo.), 23 R. R. R. 70, 46 Am. & Eng. R. Cas., N. S., 70; foot-notes appended to St. Louis & S. F. R. Co. *v.* Phillips (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201; McConnell *v.* Southern Ry. Co. (N. Car.), 23 R. R. R. 580, 46 Am. & Eng. R. Cas., N. S., 580.

company's ordinary and regular bill of lading for the transportation of goods other than cotton, live stock, and one or two special kinds of shipments, containing the stipulation that "no carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to the consignee." Held, that it was error to charge the jury: "Did both of the parties, the plaintiff and the defendant, understand by that, at the time this receipt was signed, that liability of the defendant company was limited to its own line, and until delivery to the connecting carrier in good order? Did they both understand it that way? Was that the contract between them?" Such a charge was calculated to leave the jury to infer that, although the shipper may have deliberately and expressly adopted the conditions of the regular bill of lading as part of the contract, intending to make the shipment subject thereto, and although it may have had ample opportunity for knowing what they were, yet, if its agent did not understand or have in mind this particular condition at the time of the shipment, it would not be a part of the contract.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; R. W. Freeman, Judge.

Action by the City Mills Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The City Mills Company brought suit against the Central of Georgia Railway Company, alleging that it made a shipment of certain meal from Columbus, Ga., to Jacksonville, Fla., and that the defendant failed to deliver the freight at the point of destination. The bill of affreightment was as follows: "Received from City Mills Company, Columbus, Ga., 11, 20, 1902, by C. R. R. Co., by steamer, in apparent good order the articles named below, to be delivered in like good order, without unnecessary delay: To Peacock, Hunt & West Co., at Jacksonville, Fla. Car—Marks: L. & N. 4863. As per conditions of company's bill of lading. Shipper's order notify." Then followed a description of the property, weight, and rate; and the paper was signed by the agent of the railway company. The only part of the defense which it is necessary to mention is that the defendant company had no line of railroad running from Columbus to Jacksonville, but that, as was well known to the plaintiff when it delivered the car to the defendant, after loading it, the defendant would deliver it at Albany, Ga., to a connecting line of railroad, which would transport it from that point to Jacksonville; that a menorandum receipt was given, which is set out above, and which stipulated that the car was received to be transported by the defendant as per conditions of the company's bill of lading,

one of which was that the defendant agreed to deliver the car to its connecting carrier on the route to its destination, and when it did so then all further liability for the shipment should cease as to this defendant; that it did transport the car to its terminus at Albany, and there delivered it in good order to the connecting carrier; and therefore it contends that its liability ceased.

The secretary and treasurer of the plaintiff testified, among other things, as follows: "The receipt signed by the agent of the railway company for this shipment was on the form prepared by the City Mills Company. The receipt was made out by the plaintiff and presented to the agent of the railway company, Mr. Feagin, to be signed. The receipt was made out by myself, and it was in my handwriting. This form was used at the direction of the railway company and with their approval. It was a matter of convenience, both to the railway company and to us. This receipt is not signed by me, or the City Mills Company, and no other bill of lading was shown or read to me. I have seen thousands of the Central of Georgia Railway Company's bills of lading, but I never read one of them. I do not know whether they are all alike. The form of the paper on which we have sued states that it was subject to the terms of the bill of lading. I will say that it was my intention, as representing the City Mills Company, in making out every paper or contract of shipment, that it was subject to the terms and conditions of the company's standard bill of lading, and it was so expressed in the paper, and I so understood it. The regular bill of lading of the company was not presented to me. I do not know the verbiage of the bills of lading. I never read it at all. We have always used this other form, and the question has never arisen. This form of paper sued on I had printed myself, and the verbiage of the contract reads: 'As per conditions of the company's bill of lading.' Candidly, I had never read a bill of lading of the defendant railway company. I have seen these bills of lading, as I have others; but, as I have stated, I did not have occasion to read them. I cannot say whether the regular form of lading now shown me is the kind referred to in the receipt or contract of shipment attached to our suit. I presume, of course, that the contract prepared by me for the City Mills Company refers to their regular bill of lading. I do not know how many they have. * * * I certainly did know that the bill of lading contained the terms and conditions for the protection of the company in shipments, but I was not aware of those conditions, nor what they were. * * * It was my intention, when I made out that receipt on the City Mills Company paper, and which I had prepared, to make it subject to the company's bill of lading. The bill of lading referred to was the company's regular shipping bill of lading. It was my object and intention to make it refer

to the company's regular bill of lading, but I never read the conditions."

The agent of the defendant company testified, among other things: "The railway company at that time issued several different bills of lading. The one handed me is the one they used in contracting and receipting for general merchandise. Then we have a form that applies exclusively to live stock. Then we have two cotton forms of contract, one a domestic and one a foreign shipment. We have a general form for miscellaneous articles, which includes nearly everything except cotton, live stock, and household goods. It is my opinion that the general bill of lading, or standard bill of lading, is the one referred to in the receipt of the City Mills Company for the shipment of these goods. The receipt issued on the City Mills Company's form, containing the words, 'as per conditions of company's bill of lading,' refers to the form of bill of lading handed me, which is the regular bill of lading of the company. So far as I know, this receipt was not signed either by Mr. Baird or the City Mills Company. * * * The bill of lading referred to carries the conditions of the contract of shipment. * * * If household goods were shipped, then the rate and value limitation would apply; but the condition as to the limiting liability to the end of the company's line is a general limitation that applies to all shipments. These conditions are not changed."

The form of the defendant's bill of lading introduced in evidence contained the following clauses: "The railway company agrees to carry to destination the goods shipped, if on its road, or otherwise to deliver to another carrier on the route to said destination. * * * In consideration of the rate charged under the conditions of this bill of lading, it is mutually agreed as to each carrier severally, but not jointly, of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, on the face or back thereof, all of which are agreed to by the shipper as owner, or agent for the owner, and accepted for himself or his assigns, as just and reasonable." One of the conditions on the back of the bill of lading was as follows: "No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to consignee."

The jury found for the plaintiff $111.22, and interest at 7 per cent. from December 2, 1902, to February 5, 1906, $24.65, making a total of $135.87. The defendant moved for a new trial on the general grounds, and also because the court charged as follows: "What conditions, from the evidence in this case, were referred to by the words, 'as per conditions of company's bill of lading?' Did both of the parties, the plaintiff and the de-

fendant, understand by that, at the time this receipt was signed, that liability of the defendant company was limited to its own line, and until delivered to the connecting carrier in good order? Did they both understand it that way? Was that the contract between them? You look to the evidence, and you decide what the truth about the matter is." The motion was overruled, and the defendant excepted.

Charlton H. Battle, for plaintiff in error.
A. W. Cozart and *J. H. Martin,* for defendant in error.

LUMPKIN, J. "A common carrier cannot limit his liability by any notice given, either by publication or by entry on receipts or tickets sold. He may make an express contract, and will then be governed thereby." Civ. Code 1895, § 2276. As to contracts seeking to waive the results of negligence as a common carrier, see Central Railway Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170. The express contract referred to above may be signed by the parties, but is not obliged to be so. The mere acceptance of a bill of lading or a ticket which contains a limitation upon liability will not amount to an express contract. Boyd *v.* Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783. Whether an express contract has been made limiting, in the absence of any signature of the shipper or his agent, is generally a question for the jury, if there be evidence tending to show such a contract. Southern Express Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53; Wallace *v.* Matthews, 39 Ga. 517, 99 Am. Dec. 473; Wallace *v.* Sanders, 42 Ga. 486, 490.

The presiding judge charged the jury as follows: "Did both of the parties, the plaintiff and the defendant, understand by that, at the time this receipt was signed, that the liability of the defendant was limited to its own line, and until delivered to the connecting carrier in good order? Did they both understand it that way? Was that the contract between them? You look to the evidence, and you decide what the truth about that matter is." On looking to the evidence it appears that the plaintiff's agent testified that the plaintiff itself prepared and had printed the form which was used. It was not a blank prepared by the railroad company and signed by its agent and delivered to the shipper; but the agent of the latter himself made out the receipt in his own handwriting and presented it to the agent of the railroad company to sign. The car was furnished by the company, and loaded, closed, and fastened by the plaintiff before being delivered to the railroad company. The shipment was made by "shipper's load and count." The plaintiff knew that the defendant did not have a line of railroad to Jacksonville, and that it was necessary that the car should be transported over a

connecting line in order to reach its destination. It was not a matter of haste, or of mere acceptance of a receipt on the part of the plaintiff, but of deliberation and preparation. The plaintiff voluntarily placed in a receipt prepared by it a statement that the shipment should be "as per conditions of company's bill of lading." Its agent testified that he knew the bill of lading referred to contained terms and conditions for the protection of the company in shipments, but he did not know what those conditions were. Nevertheless, without taking the trouble to inform himself, though he testified that he had seen thousands of the bills of lading, he placed this stipulation on the face of the receipt, and induced the railroad company to sign it, with such reference to the bill of lading as an integral part of it. He also testified that it was his intention, as representing the plaintiff, in making out every paper or contract of shipment, that it should be subject to the terms and conditions of the company's standard bill of lading, that such was his intention when he made out the receipt relied on, and that the bill of lading referred to was the company's regular shipping bill of lading, but that he never read the conditions thereof. If the shipper deliberately prepared a contract for the railroad company to sign, and himself placed in it an adoption of the conditions of the company's regular bill of lading, with the express assent of the company, and with the purpose of binding the shipper thereby, and thus induced the railroad to accept and use it, instead of using the regular bill of lading, it would be doing violence to the most fundamental principles of contracts of good faith between parties to allow the plaintiff afterwards to say that he was not bound by the conditions of the company's bill of lading because the shipper's own agent did not take the trouble to know what he meant by or included in the contract which he himself prepared. There is no pretense that he did not have ample opportunity to know what the conditions were before and when he adopted them as a part of the receipt which he was preparing. We think the charge of our brother of the superior court might have led the jury to believe that, although it may have been intended and expressly agreed that the shipment should be subject to the conditions of the company's bill of lading, yet if the plaintiff's agent, at the time of the shipment, did not understand the contract which he had previously prepared in blank and then filled out, and thus prepared for the other party to sign, however ample opportunity he may have had for understanding it, or however negligent it may have been not to understand it, nevertheless the plaintiff would not be bound by it.

It was contended by counsel for the plaintiff that it was not certain that the form of the bill of lading which was introduced in evidence was the one referred to in the receipt. But while at one point in his evidence the plaintiff's agent did make

use of the expression, "I cannot say whether the regular form of the bill of lading now shown me is the kind referred to in the receipt or contract of shipment attached to our suit," he immediately added, "I presume, of course, that the contract prepared by me for the City Mills Company refers to their regular bill of lading," and at another time stated that the bill of lading referred to the company's "regular shipping bill of lading."

Judgment reversed. All the Justices concur.

ILLINOIS CENT. R. Co. *v.* DAVIS & LEVY.

(Supreme Court of Mississippi, April 8, 1907.)

[43 So. Rep. 674.]

Carriers—Live Stock—Loss in Shipment—Liability.*—A carrier is not liable for the value of a mule, which died in transit and was removed from the car at an intermediate point, where there was no unnecessary delay between the place of loading and such point, and no marks upon the mule by which the cause of its death could be ascertained.

Appeal from Circuit Court, Hinds County; D. M. Miller, Judge.

Action by Davis & Levy against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiffs shipped a carload of mules from East St. Louis, Ill., to Jackson, Miss. When the car left East St. Louis there were 26 mules in it. When it arrived in Jackson there were only 25. Suit was brought to recover the value of the missing mule, and judgment rendered for $150. According to the testimony of the railroad company, one mule died in transit and was removed from the car at Mounds, Ill. There was no unnecessary delay between East St. Louis and Mounds, and there were no marks on the mule by which the cause of its death could be ascertained, and there was no testimony as to what caused its death. On this proof, the defendant railroad company asked a peremptory instruction, which was refused, which refusal is assigned as error on appeal.

J. B. Stirling, for appellant.
Watkins & Watkins, for appellee.

MAYES, J. The facts in this case bring it within the rule laid

*See generally, note 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

down in the cases of Railroad Company *v.* Teams, 75 Miss. 147, 21 South. 706, and Railroad Company *v.* Bigger, 66 Miss. 319, 6 South. 234. The peremptory instruction asked for should have been granted by the court.

Reversed and remanded.

STATE *v.* ST. LOUIS & S. F. R. CO.

(Supreme Court of Arkansas, June 17, 1907.)

[103 S. W. Rep. 625.]

Railroads—Insufficient Accommodations—Indictment—Sufficiency—Certainty.—Acts 1903, p. 303, § 1, requires railroad companies to keep separate waiting rooms now provided for in Sandels & H. Digest of Statutes, § 6219, in all depots, for the accommodation of passengers, open both day and night. Section 2 requires that the waiting rooms at all proper times shall be comfortably heated and at all times supplied with drinking water. Section 3 provides that any railroad company that shall neglect to comply with the provisions of the act shall be deemed guilty of a misdemeanor. Sandels & H. Digest of Statutes, § 6119, requires railroad companies to provide equal but separate waiting rooms for the white and African races at all their passenger depots. Held, that an indictment charging neglect to keep the waiting room at a station named comfortably heated and supplied with drinking water, but failing to designate which waiting room was meant, whether the one for the white or African race, was void for uncertainty.

Indictment—Duplicity.—Acts 1903, p. 303, § 2, requires railroad companies to keep their waiting rooms at all proper times comfortably heated, and at all times supplied with drinking water. Held, that an indictment charging a failure to keep the waiting room heated and to keep it supplied with drinking water was void for duplicity.

Constitutional Law—Equal Protection of Laws.*—Acts 1903, p. 303, § 1, requires railroad companies to keep separate waiting rooms now provided for in Sandels & H. Digest of Statutes, § 6219, in all depots, for the accommodation of passengers, open day and night, except that if no trains are run at night the depots may be closed between certain hours named. Section 2 requires that the waiting rooms at all proper times shall be comfortably heated and at all times supplied with drinking water and kept in a sanitary man-

*See foot-notes appended to Stone & Co. *v.* Atlantic Coast Line R. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

ner, and that railroads shall maintain two water-closets at their passenger depots to be designated by proper lettering, which shall be kept open for the accommodation of passengers and employees. Section 3 provides that any railroad company which shall neglect to comply with the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than $100 nor more than $300, and that any agent of a railroad company who shall neglect to comply with the provisions of the act shall be fined not less than $10 nor more than $25. Held, that the act was not unconstitutional as being in violation of Const. U. S. Amend. 14.

Hill, C. J., and McCulloch, J., dissenting.

Appeal from Circuit Court, Sharpe County; J. W. Meeks, Judge.

The St. Louis & San Francisco Railroad Company was indicted for a violation of Acts 1903, p. 303. From a judgment sustaining a demurrer to the indictment, the state appeals. Affirmed.

This is a prosecution, by indictment, for the alleged violation of an act approved April 23, 1903, which is as follows:

"Section 1. All persons who own or operate any line or lines of railroad in this State shall keep separate waiting rooms now provided for in section 6219 of Sandels & Hill's Digest in all depot buildings now erected or that may hereafter be erected, for the accommodation of their passengers, open both day and night for the free and unrestricted use of their said passengers.

"Sec. 2. That said waiting rooms shall at all proper times and seasons be confortably heated and at all times supplied with wholesome drinking water, and shall in all other respects keep and maintain said waiting rooms in a sanitary and clean manner. All railroads passing through or into any city or incorporated town in this State shall construct and maintain two water closets at their passenger depots, one for males and one for females. Said closets shall be designated by proper lettering. They shall be kept open at all hours for the accommodation of passengers and employees of said road or roads, and shall be constructed and kept in good condition.

"Sec. 3. All railway companies that shall refuse and neglect to comply with the provisions and requirements of this act shall be deemed guilty of a misdemeanor and shall, upon conviction before any court of competent jurisdiction, be fined not less than one hundred dollars ($100.00) nor more than three hundred dollars ($300.00) and every day or night that such railway company shall fail to comply with the provisions of this act shall be a separate offense, and any agent or agents of such railway company at such depot who shall refuse or neglect to carry out the provisions of this act shall, on conviction, be fined not

less than ten nor more than twenty-five dollars ($25.00) for each offense; provided, however, that upon all railroad lines running neither freight nor passenger trains over said lines after night shall be allowed to close their waiting rooms at 7 o'clock p. m. and open their waiting rooms to the public at 6 o'clock a. m.; and provided further, that the provisions of this act shall not apply to Benton, Washington and Crawford counties." Acts 1903, p. 303.

Section 6219, Sandels & H. Digest of Statutes, to which reference is made in this act, reads as follows: "Sec. 6219. All railroad companies carrying passengers in this State shall provide equal but separate and sufficient accommodations for the white and African races by providing two or more passenger coaches for each passenger train; provided, each railway carrying passengers in this state may carry one partitioned car, one end of which may be used by the white passengers and the other end by the passengers of the African race, said partition to be made of wood, and they shall also provide separate waiting rooms of equal and sufficient accommodations for the two races at all their passenger depots in this state."

The indictment is as follows: "The grand jury of Fulton county, in the name and by the authority of the state of Arkansas, accuse the St. Louis & San Francisco Railroad Company of the crime misdemeanor, committed as follows, to wit: The said St. Louis & San Francisco Railroad Company, in the county and state aforesaid, on the 16th day of January, A. D. 1906, then and there being a railroad corporation and operating a line of railroad in the state of Arkansas, and running both freight and passenger trains after night, did unlawfully fail and unlawfully neglect to keep the waiting room in the depot at Mammoth Spring, in the county and state, comfortable, heated, and supplied with wholesome drinking water, against the peace and dignity of the state of Arkansas."

The appellee presented the following demurrer: "(1) Said indictment does not state facts sufficient to constitute any public offense under the law of Arkansas. (2) Said indictment is indefinite and uncertain and not sufficiently specific to charge any offense under the laws of Arkansas. (3) Said indictment attempts to charge two or more offenses in a single count." The demurrer was sustained, and the state appeals.

Wm. F. Kirby, Atty. Gen., and *Dan'l. Taylor,* Asst. Atty. Gen., for the State.

L. F. Parker and *W. J. Orr,* for appellee.

WOOD, J. (after stating the facts). First. This indictment is void for uncertainty and duplicity. It charges neglect to keep the waiting room in the depot at Mammoth Spring "comfortable, heated, and supplied with wholesome drinking water;" but the

indictment does not designate which waiting room was intended, whether the one set apart for the white or African race. See Railway *v.* State (Ark.) 31 S. W. 570.

Second. The indictment also charges two separate and distinct offenses, to wit, the neglect to keep the waiting room heated, and the neglect to keep it supplied with wholesome drinking water. These could not be joined in the same indictment. State *v.* Lancaster, 36 Ark. 55; State *v.* St. L. & S. F. R. Co., 103 S. W. 623.

Third. The statute is not violative of the fourteenth amendment.

The judgment is therefore affirmed.

HILL, C. J., and MCCULLOCH, J., dissent.

PROSPERT *v.* RHODE ISLAND SUBURBAN RY. CO.

(Supreme Court of Rhode Island, June 27, 1907.)

[67 Atl. Rep. 522.]

Carriers—Suburban Railways—Duty to Passenger—Protection from Cold.—Plaintiff was a passenger on one of defendant's suburban electric cars, which became stalled in a snowstorm, so that plaintiff was obliged with her infant child to remain in the car for 11½ hours, during which she suffered from cold, at the end of which time the conductor obtained shelter for the plaintiff and her child in a nearby house. Held, that defendant's contract duty to carry plaintiff safely to her destination and so conduct the operation of its cars as not to injure her protected plaintiff only against any willful act or negligence on the part of defendant's employees, and that the conductor was under no legal obligation to take steps before he did to find comfortable shelter for plaintiff outside the car.

Action by Mary E. Prospert against the Rhode Island Railway Company. A verdict was directed for defendant, and plaintiff moved for a new trial. Denied.

Argued before DOUGLASS, C. J., and DU BOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Page & Page & Cushing, for plaintiff.
Henry W. Hayes, for defendant.

PARKHURST, J. This is an action of trespass on the case for negligence. The case was tried before a jury in the common pleas division on the 16th day of May, 1904, and after the plaintiff had submitted her evidence the defendant's counsel moved that a verdict be directed for the defendant. This motion was granted by the court, and a verdict was accordingly directed,

and to this ruling the plaintiff duly excepted. The case now comes up on the plaintiff's petition for a new trial, based upon exception to the aforesaid ruling and claiming that the same was erroneous.

The declaration alleged that the plaintiff was, on December 13, 1902, a passenger on one of the defendant's electric cars, and that "the said car then and there became and was stopped and stalled in a certain deep snow and snowstorm, and thereupon became and was very cold and of a temperature and condition dangerous to the health of any person remaining in the same while the same was unheated as aforesaid." Said declaration further alleged that it was the duty of the defendant to then and there "use due care to transfer and forward the plaintiff to some place of shelter and warmth, and where she would not be exposed to the aforesaid dangers of said car." And the declaration averred that the defendant negligently allowed the plaintiff to remain in the condition aforesaid for a long time, to wit, about 11½ hours, and that, if the defendant had used due care and made reasonable exertions to relieve the plaintiff from said dangerous situation, it could have done so; that the plaintiff was injured by said neglect, and she herself was in the exercise of due care and unable to transfer herself to a place of shelter and warmth on account of said deep snow and severe storm. The plea was the general issue.

Evidence was introduced by the plaintiff to prove the allegations of fact contained in the declaration, and to the effect, also, that the car was stopped by the snow at different places from time to time as efforts to move the car were made and were partially successful, and that there were dwelling houses near said places where the car was stopped, and that the plaintiff requested the conductor to apply to the residents of one or more of said houses for shelter for herself and her infant son, and that the conductor refused so to do until after 3 o'clock a. m. on the day after she took passage, when he did apply to a man who was walking in the road, and obtained admission for the plaintiff and her child and another passenger to a house nearby. No testimony is offered, however, to show just how near any one of the other houses was to the car, or whether it was possible for the conductor safely to convey the plaintiff and her baby to any one of these houses at the time of her request. It is as fair to suppose that the conductor did not attempt to assist the plaintiff to any of the other houses because of the danger of such attempt as it is to say that he refused for any other reason. There is no testimony to show that the conductor himself left his car, or could leave it safely, for any distance, or at all, at such times.

The plaintiff claims that, under these circumstances, the general duty of the defendant to carry its passengers safely to their destination, including its duty to protect them from injury while

in transit, is broad enough to include the further duty, in a case like the present, when the further operation of the car is prevented by the act of God, to place its passengers in a position of warmth and shelter and to protect them from the effects of the elements, and that by reason of its failure so to do it was guilty of neglect of duty, and thereby became liable to the plaintiff for her injury and suffering. No case has been cited where the duty of the carrier of passengers has been held to extend thus far, and counsel on both sides have assured us that they have made diligent search for such authority and have found none, and none such has come to the attention of the court.

The contract of the defendant in this case was to carry the passenger safely to her point of destination, and so to conduct the operation of its cars as not to injure her by any willful act or negligence on the part of its employees. The defendant could not be held to be guilty of negligence in failing to further operate its car after it had been stopped by the snow, having exhausted all its power in the effort to move the car from time to time against the accumulation of the snow. It was not, then, guilty of negligence in not carrying the plaintiff to her destination; and, having carried her as far as it could by the exercise of its power with the appliances at its disposal, it had done all that could be required to carry out its legal duty in her behalf. It would, indeed, have been an act of humanity and kindness on the part of the conductor, as of any other person seeing the plaintiff helpless and exposed to injury from cold and snow, to have helped her to a place of safety, if possible; and the duty of so doing, resting in moral rather than in legal obligation, would have been a personal one, resting upon the conductor or the motorman as an individual, and not as an agent or servant of the defendant corporation, in the same way and to the same extent that it would have rested upon any individual, had the plaintiff seen fit to leave the car and endeavor to struggle through the snow to a place of safety. The duty of assistance or rescue in such case rests, not in contract, or in legal obligation, but in moral obligation growing out of human relations, and therefore is not a proper ground of action for damages. As stated above, there is no evidence to show that a removal of the plaintiff and her infant son from the car could have been safely made at any time before it was actually done, and it may well be that the attempt, if made, would have caused greater injury than was actually suffered.

We are of the opinion that the court below did not err in directing a verdict for the defendant upon the evidence before it. The plaintiff's petition for a new trial is denied, and the case is remitted to the superior court, with direction to enter judgment upon the verdict.

JONESVILLE MFG. CO. *v.* SOUTHERN RY.

(Supreme Court of South Carolina, Aug. 5, 1907.)

[58 S. E. Rep. 422.]

Trial—Nonsuit.—If there is any evidence to go to the jury, or if plaintiff makes out a prima facie case, a nonsuit will not be granted.

Evidence—Law of Other State—Presumptions.—The law of Wisconsin not having been proved, it will be presumed to be the common law as understood and enforced by the courts of South Carolina.

Carriers—Freight—Notice to Consignees.—Where it was shown that it was the custom of defendant carrier to notify consignees of arrivals of their goods, the presumption is that, if the goods for the loss of which plaintiff sued had arrived, notice would have been given.

Commerce—Interstate Commerce—Liability of Initial Carrier.*—Code 1902, § 2176, makes the initial carrier liable for the loss of goods shipped over its line and connecting lines unless a receipt in writing is produced from the connecting carrier. Held, that the act is not unconstitutional, as seeking to impose any burden on interstate commerce.

Carriers—Initial Carriers—Receipt from Connecting Carrier.—A receipt within Code 1902, § 2176, making initial carrier liable for loss of goods shipped over it and connecting lines unless it produces a receipt in writing, is not required to be in any particular form, and evidence of a freight agent of the railroad company testifying from a record of his office, known as the "per diem sheet," that the goods shipped were received on a waybill on a certain date and transferred to a car of another railroad company for such railroad company, and were receipted for by them at a certain hour on that day, was sufficient.

Appeal from Common Pleas Circuit Court of Union County.

Action by the Jonesville Manufacturing Company against the Southern Railway. Judgment for plaintiff, and defendant appeals. Reversed.

Sanders & De Pass and *Townsend & Townsend,* for appellant.
J. Ashby Sawyer, for respondent.

POPE, C. J. This action was begun on August 4, 1905, by the plaintiff to recover of the defendant railroad company the value

*For the authorities in this series on the subject of state interference with interstate commerce, see foot-notes appended to State *v.* Omaha Elevator Co. (Neb.), 23 R. R. R. 510, 46 Am. & Eng. R. Cas., N. S., 510; foot-notes appended to Harrill Bros. *v.* Southern Ry. (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S.. 427.

of five cases of hosiery delivered to it at Jonesville, S. C., consigned to Kaufer, Smithing & Co., Milwaukee, Wis., the same being five of a shipment of seven cases. The defendant admitted the receipt of the goods, but alleges that they were lost by a connecting carrier, and produced in evidence a contract of carriage, signed by both parties, by which it was agreed defendant's liability should be limited to its own line. Also, by its amended answer, it set up loss by the act of God. The case came on for trial before his honor, Judge Geo. E. Prince, and a jury at the June, 1906, term of court for Union county, and resulted in a verdict of $313.39 for the plaintiff. A motion for a new trial having been refused, defendant appealed.

1. The first question we consider is whether a nonsuit should have been granted. If there is any evidence to go to the jury, or if the plaintiff makes out a *prima facie* case, a nonsuit will not be granted. Norris *v.* Clinkscales, 44 S. C. 315, 22 S. E. 1; Jacobs *v.* Gilreath, 45 S. C. 46, 22 S. H. 757; Springs *v.* Railway, 46 S. C. 104, 24 S. E. 166, and numerous other cases. Here plaintiff proved delivery to the defendant and that the goods were not received by the consignee. Defendant contends, however, that there was no evidence showing the goods did not arrive at Milwaukee, and therefore the presumption is that they did arrive; that the circuit judge was in error in charging that it was incumbent upon the railroad to give the consignee notice of the arrival of the goods at their destination. The last contention must be sustained. The law of South Carolina does not require notice. Bristow *v.* Railway, 72 S. C. 44, 51 S. E. 529. The law of Wisconsin, not having been proved, will be presumed to be the common law as understood and enforced by the courts of this state. But, apart from this, it was shown that it was the custom of the defendant to notify Kaufer, Smithing & Co. of the arrival of their goods, as was done in the case of the two cases received. The presumption, therefore, is that, if these goods had arrived, notice would have been given to the consignee. Hence, plaintiff having shown delivery to the defendant and that Kaufer, Smithing & Co. never received any notice of their arrival, a *prima facie* case was made out and the nonsuit was properly refused.

2. The controlling question in the case is the construction of section 2176 of the Civil Code of 1902, which provides: "In case of loss or damage to any article or articles delivered to any railroad corporation for transportation over its own or connecting roads, the initial corporation or corporation first receiving the same, shall in every case be liable for such loss or damage, but may discharge itself from liability by the production of a receipt in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event,

the said connecting road or roads shall be severally so liable, but may in succession and in like manner discharge themselves respectively therefrom; but if any such corporation shall willfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefit of such exemption in any action against the said railroad corporation to render it liable for such loss or damage." The circuit judge charged and held, in overruling the motion for a new trial, that under this statute defendant was absolutely liable if it failed to produce a receipt from its connecting carrier. Defendant attacked the constitutionality of the act as applied to carriers beyond the borders of the state. We think the act is constitutional. It does not seek to impose any burden on interstate commerce. There is no attempt in any way to try to prevent the carrier from making a contract limiting its liability to its own road. Where such a contract is entered into, however, the road remains responsible until it proves that it did not cause the loss or damage. The act in question was intended only to establish a rule of evidence by which the connecting carrier could relieve itself of such liability, which, according to the case of Richmond, etc., Railroad *v.* Patterson Tobacco Company, 169 U. S. 312, 18 Sup. Ct. 335, 42 L. Ed. 760, a state has a right to do.

The question arises, then: What constitutes a receipt in writing? The term usually implies a formal paper signed by one party and delivered to another. This was doubtless the meaning of receipt in the mind of the circuit judge when he charged the jury in this case. We do not, however, think that such a limitation should be put upon the act. Its purpose was to enable railroads to relieve themselves from liability for loss of goods by showing by written evidence that they had been delivered to a connecting carrier. In the case of Miller Bros. *v.* Railway, 33 S. C. 359, 366, 11 S. E. 1093, 1959, 9 L. R. A. 833, in which objection was made to the admission of certain evidence, thus raising the identical question raised here, the court said: "Without now understanding to decide whether there are circumstances under which parol testimony may be admissible to prove the delivery of property by one carrier corporation to its next connecting line, we think the testimony of Cudworth as to the receipt of the property by the steamship line cannot be said to be 'merely oral.' He said 'he recollected the receipt of the goods by referring to my receipts.' Being shown the paper, dated October 4, 1887 (Exhibit C), he said: 'That is the original in my handwriting. These [describing the property] are checked off as received. They are records of my office; duplicates were furnished the South Carolina Company,' etc. We do not understand that the act requires the receipt spoken of to be in any particular

form. The intention was to require the delivering company, in order to discharge itself, to produce such written evidence of the receipt of the property by the connecting carrier to which it is delivered as will shift the liability to account for the property to that company. As it seems to us, the paper dated October 4, 1887, and signed by Alfred Cudworth 'for steamer,' sufficiently identifies the property received, and is substantially such 'receipt in writing' as to be a discharge to the railroad company." Applying this language to the case now under consideration, we think there is such production of a receipt as will prevent the circuit judge from holding that there was a total failure on the part of the defendant to produce a receipt in writing, and therefore it could not possibly get a verdict in its favor. Witness Pollard, the freight agent of the Mobile & Ohio Railroad Company at St. Louis, testified from a record of his office, known as the "per diem sheet," that "the seven cases billed K. F. products were received at East St. Louis, June 4, 1903, in Southern car No. 24082, from Corinth, Miss., on waybill 25, dated June 1, 1903; that they were transferred, on June 5, 1903, into C. & A. car No. 15173, which was delivered to the Terminal Railroad Association at East St. Louis, Ill., for the C. & A. road on June 6, 1903, and were receipted for by them at 3:45 that day." According to the testimony, the per diem sheet accompanies all cars transferred from one railroad company to another, and is signed by the agent for both receiving and delivering roads, and it is an acknowledgment of the receipt of the car by the receiving company. It is to establish the delivery of cars to the railroad interested. This sheet was also introduced in evidence and was, according to the language of the court above cited, of itself apart from other records and testimony based upon them, sufficient receipt of the goods by the Mobile & Ohio Railroad Company.

This conclusion, we think, is decisive of the case. There are other exceptions, but the decision of this question either decides them or makes consideration of them unprofitable.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

SHAW *v.* SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Dec. 11, 1906.)

[55 S. E. Rep. 713.]

Carriers—Injuries to Passenger—Contributory Negligence.—Under Revisal 1905, § 2628, providing that a railroad company shall not be liable for injuries to a passenger while on the platform of a car, in violation of the printed regulations of the company, posted in a conspicuous place, inside of its passenger cars, where it furnished room within such cars sufficient for the proper accommodation of its passengers, the company was not liable for injuries to a passenger who, after the porter called out the name of the station at which she intended to alight, and while the train was still moving, went upon the car platform in violation of the printed regulations so posted, and was injured by the sudden jerking of the train, though she went upon such platform in the bona fide belief that the train had come to a full stop, and though a reasonably prudent person under the same circumstances would have so believed and acted.

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by Bessie Shaw against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. New trial granted.

This was a civil action tried before Bryan, judge, at Mecklenburg superior court, for the recovery of damages for injuries sustained by plaintiff as the result of an alleged fall from the front platform of one of the defendant's passenger cars while a passenger thereon on the night of February 26, 1905, at a point about three-quarters of a mile west of Matthews, N. C., which fall, it is claimed, was caused by the sudden and violent jerking of the train. The court submitted the usual issues of negligence, contributory negligence, and damage. The jury found the issues for the plaintiff and assessed her damages. From the judgment rendered, defendant appealed.

Burwell & Cansler, for appellant.
Stewart & MacRae and *Tillett & Guthrie,* for appellee.

BROWN, J. Plaintiff was a passenger on defendant's passenger train going to Matthews, N. C. In the car in which she was traveling was the following printed notice posted up at the time in a conspicuous place: "NOTICE! Passengers are prohibited from going on PLATFORMS or between CARS while the

train is in motion, and are warned not to allow their HEADS or LIMBS to project from CAR WINDOWS." The evidence is conflicting, but there is much evidence tending to prove that plaintiff went out on the platform of the car and was injured thereon while the train was moving and before it had come to a stop. Section 2628, Revisal 1905, reads as follows: "In case any passenger on any railroad shall be injured while on the platform of the car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, said company shall not be liable for the injury: provided said company, at the time, furnishes room inside its passenger cars sufficient for the proper accommodation of its passengers." It is not contended that plaintiff went out on the platform for lack of room inside the car, because it appears from her own testimony that she had a seat; nor did she go out at the invitation of the defendant's agent. Her testimony is that the train was not in motion when she went on the platform.

The following instruction was given by the court to which defendant duly excepted: "If the jury shall find that, when the plaintiff went upon the platform, she did so in the bona fide belief that the train was not in motion, but that it had come to a full stop, and that a reasonably prudent person under the same circumstances would have so believed and so acted, then you are instructed that section 2628 of the Revisal of 1905 would not apply, although the train had not actually come to a full stop, and, in this view, if you shall find that the defendant was guilty of negligence, as alleged in the complaint, you will answer the first issue 'Yes.'" The rule of the defendant company, which we have quoted, is given, when the terms of the statute have been complied with, the force and effect of a law of the state prohibiting passengers from going out on the platform of moving trains and barring a recovery for injuries sustained under such circumstances. In other words, when the railroad company complies with the statute, and the passenger voluntarily violates the rule posted for his protection, and he is consequently injured, the law refuses him a right of action. The passenger's conduct is not to be governed entirely by the doctrine of contributory negligence as expounded by the courts, but rather in the light that there is no actionable negligence—no cause of action. The statute is made for the protection of passengers as well as for that of the railroad company, and specifically relieves the company from any liability when the passenger violates its provisions. The vice in the quoted instruction is that it gives to the passenger the benefit of the rule of the prudent man as if the matter were being considered under the second issue and solely in the light of contributory negligence. The instruction reads into the statute something that is not there and practically

places upon the railroad company the responsibility for the passenger's error. However inadvertent such error, the passenger, and not the carrier, is to blame. His honor assumes that the train was moving (how fast he did not state), and declares that the statute does not apply if the plaintiff entered upon the platform in the bona fide belief that the train was not moving, and if a reasonably prudent person under similar circumstances would have so believed and so acted. This practically nullifies the force and effect of the statute, and leaves it for the jury to determine when they will apply the statute, and when not. It is a very simple and easy matter by observing outside objects or the earth itself to tell when a train is at a standstill, and it imposes no hardship upon a passenger to require him to be certain as to that before entering upon the platform. The carrier owes no duty to be upon the lookout for passengers who violate the printed rule and go on the platform when prohibited, and the engineer and those in charge of the train have a right to suppose that passengers will remain in the car until it comes to a full stop, and they have a right to act accordingly. The statute contains no exception to its general provision, and in plain terms relieves the company from liability in the case of a passenger injured while on the platform of a moving train when the company, as in this case, has complied with its terms. In Denny *v.* Railroad, 132 N. C. 340, 43 S. E. 847, it is held that a passenger who voluntarily goes upon the platform of a moving train for the purpose of alighting at the station, and is injured by reason of a jerk in the train, is not entitled to recover therefor, and Mr. Justice Connor, speaking of the duty of the engineer, says: "He cannot be supposed to know or anticipate that passengers, in defiance of the rules, have gone upon the platform and are standing upon the steps of the car while in motion." See, also, Railroad Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403.

In the case before us, as in Denny's Case, there is no suggestion that the conductor was upon the platform and no evidence that plaintiff was invited to go out there preparatory to leaving the train. The fact that the porter called out the station name before reaching the station was no invitation to go upon the platform, for at that time the train was running rapidly, and only after the announcement did it begin to slow down. In Smith *v.* Railroad, 88 Ala. 538, 7 South. 119, 7 L. R. A. 323, 16 Am. St. Rep. 63, it is said: "The mere announcement of the name of a station is not an invitation to alight; but, when followed by a full stoppage of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers. * * * Comparing all the cases, we deduce that, when the name of the station is called, and, soon thereafter, the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the cir-

cumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place." To the same effect are the following cases: England *v.* Railroad (Mass.) 27 N. E. 1; Railroad Co. *v.* Holmes, 97 Ala. 332, 12 South. 286; Mitchell *v.* Railroad, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Railroad *v.* Green (Ill.) 25 Am. Rep. 255; Minock *v.* Railroad (Mich.) 56 N. W. 780.

It is contended by defendant that there is a material variation between the allegation of the complaint and plaintiff's proof, in that she alleges in her complaint that the train was moving when she entered on the platform, and in her testimony she states that it was at a standstill. It is unnecessary that we consider this, as the complaint may be amended before another trial.

New trial.

POMROY *v.* BANGOR & AROOSTOOK R. CO.

(Supreme Judicial Court of Maine, June 8, 1907.)

[67 Atl. Rep. 561.]

Carriers—Carriages of Passengers—Duty of Passenger.*—When the relation of passenger and common carrier of passengers exists, the law requires that the passenger should exercise such care as persons of ordinary prudence and intelligence would exercise under the same circumstances.

Same—Duty of Carrier.†—It is the duty of a common carrier of passengers to do all that human vigilance and foresight can, under the circumstances, considering the character and mode of conveyance, to prevent accidents to passengers.

Same.—Ordinary care under the circumstances is the legal standard in all cases. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. This care is to be exercised by the carrier of passengers at all times when, and at all places where, the parties are in the relation of passenger and carrier, whether during transit, at the stations, upon platforms, or in

*See foot-notes appended to Farrell *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408.

†See foot-notes appended to Farrell *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to Chicago City Ry. Co. *v.* Shreve (Ill.), 23 R. R. R. 444, 46 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to Louisville & N. R. Co. *v.* Mulder (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66; Williamson *v.* Central of Georgia Ry. Co. (Ga.), 23 R. R. R. 57, 46 Am. & Eng. R. Cas., N. S., 57; Atchison, etc., Ry. Co. *v.* Calhoun (Okla.), 22 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791.

waiting rooms; and it applies to all matters which pertain to the business of the carrier of passengers.

Same—Action for Injuries—Evidence—Sufficiency.—In the case at bar, a short time previous to the accident whereby the plaintiff was injured, the defendant's station buildings at Sherman or Patten Junction were destroyed by fire, and on the date of the accident the defendant was engaged in rebuilding its passenger depot at said junction, and no waiting room had been completed so as to be used by the public. On the west side of a long platform, which had been newly laid between the tracks, a car had been left for the accommodation of passengers, to be temporarily used as a waiting room, and it was customary to allow passengers coming from Patten to Sherman to wait in the passenger car on which they came until ready to take the trains going north or south. The plaintiff, a passenger from Patten and bound north, remained in the Patten car for some time after its arrival at Patten Junction, and then, as she alleged, on attempting to alight from the car platform, and without previous notice to her, the car was suddenly started, and she was thrown against the edge of a platform, and received bodily injuries. The plaintiff recovered a verdict against the defendant for $3,000. Held that, on the qustion of the defendant's liability, the evidence does not manifestly show that the verdict was wrong, but that the damages awarded were excessive, and, unless remittitur be made, the verdict must be set aside.

(Official.)

On motion from Supreme Judicial Court, Aroostook County.

Action by Annie Pomroy against the Bangor and Aroostook Railroad Company.

Action on the case to recover damages for personal injuries sustained by the plaintiff, and alleged to have been caused by the negligence of the defendant while she was alighting from a railroad car at Sherman Station or Patten Junction, so called, on the line of the defendant's railroad. Plea, the general issue. Verdict for plaintiff for $3,000. The defendant then filed a general motion for a new trial.

Sustained unless remittitur be made.

Memorandum: One of the justices did not sit in this case, being disqualified by reason of being a stockholder in the defendant company.

Argued before WHITEHOUSE, STROUT, PEABODY, and SPEAR, JJ.

Ira G. Hersey and *Shaw & Lewin,* for plaintiff.

Powers & Archibald, F. H. Appleton, and *Hugh R. Chaplin,* for defendant.

PEABODY, J. This was an action on the case brought by the plaintiff against the defendant company to recover damages for personal injuries alleged to have been received through the negli-

gence of the defendant's servants while she was alighting from a railroad car at Sherman Station or Patten Junction, so called, on the line of the defendant's railroad.

The jury rendered a verdict of $3,000 in favor of the plaintiff.

The case is before the law court on a general motion for a new trial filed by the defendant. The provisions which the jury must have found proved are (1) that at the time of the accident the plaintiff was in the exercise of reasonable care; (2) that the accident was caused by the defendant's negligence; (3) that the damages awarded were a reasonable compensation for the injuries directly and naturally resulting from the accident.

The issues raised by the motion are, first, whether the verdict is against law; second, whether it is manifestly against the evidence and weight of evidence; third, whether the damages awarded by the jury are excessive. It is not in controversy that the relation of passenger and common carrier of passengers existed between the parties at the time of the accident. This is an important fact, bearing upon the question of the care which the law required of the respective parties for the safety of the passenger while this relation existed. The law requires that the passenger should exercise such care as persons of ordinary prudence and intelligence would exercise under the same circumstances. The duty of the common carrier of goods is distinctly different from that of the common carrier of passengers. The former is under an implied contract to deliver the goods received for transportation safely to the consignee, unless loss or injury occurs by the act of God or the public enemy, while the latter is only required to do all that human vigilance and foresight can under the circumstances, considering the character and mode of conveyance, to prevent accidents to passengers. Libby *v.* Maine Central Railroad Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Rodgers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Raymond *v.* Portland Railroad Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94. In the last case cited we have decided that the distinction in degrees of care, such as "slight," "ordinary," or "great," is unscientific and impracticable, as the law furnishes no definition of these terms which can be applied in practice Ordinary care, under the circumstances, is the legal standard in all cases. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. This care is to be exercised by the carrier of passengers at all times when, and at all places where, the parties are in relation of passenger and carrier, whether during transit, at the station, upon platforms, or in waiting rooms; and it applies to all matters which pertain to the business of the carrier of passengers. Dodge *v.* Boston & B. S. S. Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am.

St. Rep. 541; Jordan v. N. Y., N. H. & H. R. Co., 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522; Shannon v. B. & A. Railroad Co., 78 Me. 52, 2 Atl. 678.

It appears from the facts not in controversy that a short time previous to August 8, 1903, the date of the accident, the defendant's station buildings at Sherman or Patten Junction were destroyed by fire, and that on this date the defendant was engaged in rebuilding the passenger depot, and no waiting room had been completed so as to be used by the public. On the west side of the long platform, which had been newly laid between the tracks, a car had been left for the accommodation of passengers, to be temporarily used as a waiting room, and it was customary to allow passengers coming from Patten to Sherman to wait in the passenger car on which they came until ready to take the train going north to Houlton or south to Bangor.

There is conflicting evidence as to conversations between the plaintiff and conductor and baggage master relating to the car which was used for the Patten passengers, as to whether it was in motion when she attempted to alight, and as to the direct cause and manner of her falling upon the platform. The plaintiff testifies that the conductor told the lady passengers before the train reached the station that they could remain in the car or get out just as they chose, and said that the car would stay there until the other train came up; that, being tired of sitting in the car, she thought she would go out, and was going out as carefully as she could, and, as she got down on the second step of the car, it started quick, and she was thrown on her right side against the edge of the platform next to the train; that she had no notice that the car was going to move. The conductor in his testimony denies that he made any announcement to the passengers in regard to the car. The baggage man states that, in answer to the plaintiff's inquiry, he told her that the car would remain in that place until the train for Houlton arrived, but would probably move around some, and would be back to the station before the arrival of the train for Bangor; that, after he gave the signal, the car commenced to back up very slowly, slower than a man would naturally walk on the platform. The baggage master at the station says that the plaintiff was stepping off the car while in motion when she fell. A carpenter who had charge of rebuilding the station buildings states that he saw the plaintiff rush out of the car while it was moving and fall upon the platform; that he should say she jumped. Another carpenter states that he saw the Patten train back in and afterward saw it backing back, and, while looking at the moving train saw the plaintiff come to the door hurriedly, and, as she stepped or jumped from the care steps, she fell on the platform.

In the absence of exceptions, we are to assume that the jury were fully and correctly instructed as to the legal principles ap-

plicable to the case. The evidence of the plaintiff, if substantially correct, sustains *prima facie* the propositions that she received injuries to which no negligence on her part contributed, and that these injuries were caused by the negligence of the defendant. In the absence of notice or warning, she had the right to assume that the car which was used as a temporary waiting room would remain stationary until after the arrival of the train for Houlton, and, if there was occasion or necessity for moving the car, the omission on the part of the servants of the company to notify a passenger would be negligence. And, even if the testimony introduced by the defendant corporation is substantially correct, it constitutes no such preponderance of evidence in its favor as to manifestly show that the verdict was unwarranted. The facts in the case at bar are more nearly analogous to those in Shannon *v.* Boston & A. R. Co. *supra*, than to those in McDonald *v.* Boston & M. R. R. Co., 87 Me. 466, 32 Atl. 1010.

The defendant's claim in support of the motion that the damages were excessive seems to us to have merit.

The manner of the plaintiff's fall upon the platform is described by her and by witnesses called by the defendant, as already stated. The theory of the plaintiff is that she was thrown by a sudden movement of the car in a partially upright position and struck her side against the edge of the platform, which it is contended would account for the injuries claimed to have been sustained, and that of the defendant is that she jumped, falling on her right side lengthwise on the platform, which it is argued would make the nature of the injuries claimed improbable.

The immediate results of the fall were not sufficiently serious to attract the attention of those at the station or to prevent the plaintiff from continuing her journey to Houlton, instead of returning home by a train soon to arrive, and her statement as to the effects upon her is somewhat inconsistent with her conduct on that day, and for several months thereafter, and is still more inconsistent with the claim that the abnormal conditions now shown to exist were caused solely by the accident.

If her injuries were indicated by all the symptoms testified to by her and witnesses, the damages awarded were conservative, and none the less so because they may have been intensified by pre-existing disease; but there should be no confusion as to the suffering and disability naturally resulting from the accident and that to be imputed to other causes. We think it is conclusively shown by the testimony of the medical experts, called both by the plaintiff and the defendant, that she had been previously suffering from a complication of physical troubles which would account partially at least for the pain, nausea, and nervous condition to which she is subject. It appears after careful analysis of the evidence that the jury must have estimated the damages returned by their verdict upon the assumption that the plaintiff

had, previous to the accident, always been in perfect health. The testimony which tends to prove this is discredited by the results of the physical examination of the plaintiff made by professional witnesses.

While it is difficult to apportion suffering or disability as between distinct contributing causes, this is necessary when compensation is to be computed, and it should be done with a just consideration of the rights of the parties. In this case the damages awarded by the jury are clearly excessive.

The motion is sustained, unless the plaintiff within 30 days after the rescript is filed remits from the amount of the verdict all above $500.

COOPER *v.* SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Sept. 6, 1907.)

[58 S. E. Rep. 930.]

Carriers — Connecting Carriers — Injury to Shipment — Presumption.*—The presumption from the receipt by a consignee from the terminal carrier of a shipment of goods damaged by breakage is that the goods were damaged while in the possession of such carrier.

Appeal from Circuit Court, Richland County; D. E. Hydrick and R. Withers Memminger, Judges.

Action by J. B. Cooper against the Seaboard Air Line Railway, Judgment for plaintiff. Defendant appeals. Affirmed.

E. L. Craig and *Lyles & McMahan,* for appellant.
De Pass & De Pass, for respondent.

JONES, J. In this action brought in a magistrate court, plaintiff sought to recover of defendant $8 damage by breakage while in its possession to a shipment of a box of crockery ware from Cincinnati, Ohio, to Blaney, S. C., and $50 penalty for failure to adjust and pay the claim within 90 days after the filing thereof, as prescribed by the act of February 23, 1903 (24 St. at Large, p. 81.) The first trial resulted in a verdict for plaintiff, which,

*For the authorities in this series on the subject of the burden of proving which carrier was guilty of the negligence causing loss of or injury to freight transported over several connecting lines, see foot-notes appended to Norfolk & Western Ry. Co. *v.* Wilkinson (Va.), 23 R. R. R. 290, 46 Am. & Eng. R. Cas., N. S., 290; foot-notes appended to Beede *v.* Wisconsin Cent. Ry. Co. (Minn.), 9 R. R. R. 290, 32 Am. & Eng. R. Cas., N. S., 290, where all the preceding authorities in this series are collected.

on appeal to the circuit court, was set aside, and the case remanded to the magistrate court for a new trial, because of error in the admission of testimony. On the second trial before the magistrate judgment was rendered in favor of plaintiff in the sum of $58, and, on appeal to the circuit court, this judgment was affirmed, from which defendant appealed to this court on one exception, assigning error to the circuit court in holding the act of February 23, 1903 (24 St. at Large, p. 81), not violative of article 1, § 8, cl. 3, Const. U. S., relating to interstate commerce.

On the trial before the magistrate court, defendant offered no testimony, and the only testimony offered by plaintiff was proof of damage by breakage to the goods received. There was a presumption, therefore, that the goods were damaged while in the possession of the defendant, the terminal carrier. Willet *v.* Railway Co., 66 S. C. 478, 45 S. C. 93; Walker *v.* Railway, 76 S. C. 309, 56 S. E. 952. And the finding of fact on this point by the circuit court is conclusive. This case, therefore, falls within the principle stated in Charles *v.* A. C. L. R. R. Co. (recently filed), 58 S. E. 927, which sustained the constitutionality of this Statute as applied to carriers doing business in this state in whose possession goods were lost or damaged.

The judgment of the circuit court is affirmed.

CHARLES *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Aug. 31, 1907.)

[58 S. E. Rep. 927.]

Carriers—Connecting Carriers—Loss of Shipment—Evidence.—For the purpose of showing that four bags out of a shipment of rice were lost while in the possession of the terminal carrier, a freight bill for transporting 30 packages of rice presented by such carrier to, and paid by the consignee, and indorsed, "4 sacks short," is relevant.

Same.—A prima facie showing of loss while in the hands of the terminal carrier is made out by the testimony of the consignee that he ordered 30 bags of rice of W., and that such carrier presented to him, and he paid, a freight bill for carrying 30 packages of rice consigned by one having the same initial as W., and that it was indorsed, "4 sacks short."

Appeal—Harmless Error.—There being sufficient undisputed evidence to support the judgment of a magistrate, error in admitting other evidence will be considered harmless.

Evidence—Best and Secondary—Writings Collateral to Issues.—Plaintiff, in an action by the consignee against a carrier for loss of 4 bags out of a shipment of 30 bags of rice, may testify that he had bought 30 bags of rice of W., without producing the written order and acceptance admitted to be in existence, defendant's liability being dependent not on such contract, but on its possession for transportation of goods consigned to plaintiff, and such contract being merely a collateral matter, as to which parol testimony is admissible.

Commerce—Interstate Commerce—Regulation.*—Act 1903 (24 St. Large, p. 81), providing a penalty of $50 to be paid the consignee by a carrier doing business in the state, for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, is not unconstitutional as an interference with interstate commerce, even in case of an interstate shipment.

Appeal from Common Pleas Circuit Court of Florence County; Geo. W. Gage, Judge.

Action by R. Keith Charles against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Willcox & Willcox, for appellant.
Galletly & Ragsdale, for respondent.

*See foot-note appended to Atlantic Coast Line Ry. Co. *v.* Commonwealth (Va.), 11 R. R. R. 399, 34 Am. & Eng. R. Cas., N. S., 399; foot-note appended to Harrill Bros. *v.* Southern Ry. (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

Charles v. Atlantic Coast Line R. Co

JONES, J. This action was brought in a magistrate court to recover the value of four sacks of rice alleged to have been shipped from New Orleans, La., by Martin J. Wynne to the plaintiff at Timmonsville, S. C., and to have been lost while in the possession of the defendant carrier, and also to recover $50 penalty for failure to adjust and pay the claim within 90 days, as prescribed by the act of February 23, 1903. The magistrate gave judgment against defendant for the amount claimed, $68.48, which judgment on appeal was affirmed by the circuit court.

We notice first appellant's seventh and eighth exceptions, alleging error in finding that the rice sued for was lost while in the possession of the defendant, there being no testimony whatever tending to show such fact. The circuit court found that "the defendant presented to and collected from the plaintiff a freight bill for 30 sacks of rice, and marked on the bill, '4 sacks short,' * * * that it was warrantable to conclude that the four sacks of rice did come into the possession of the defendant company, for it collected the freight on the four sacks, and declared that the rice was missing. Enough was proven to cast on the defendant company the burden of proving that, when the shipment reached its line, four sacks were then missing. The defendant alone knew the fact, and it did not prove it." The plaintiff was the only witness examined in the case and his testimony warranted the conclusion of the circuit court, if his testimony on this point was admissible. The fifth exception charges that it was error to admit in evidence the freight bill, Exhibit F, on the ground of irrelevancy. It appears from the exhibit that defendant collected from plaintiff $13.50 freight for transporting "30 pkts. rice," and that the consignor was "M. J. W.," and that four sacks were short. Plaintiff testified that in August, 1905, he ordered Martin J. Wynne of New Orleans to ship 30 bags of rice, and paid him for the same, and that he paid the freight for 30 bags, and only received 26. There was no evidence of any other order by plaintiff for rice or shipment of rice to plaintiff during the period involved in the controversy. The freight bill and its payment with this statement indorsed thereon was clearly relevant. It tended to show a single shipment of 30 bags of rice to plaintiff by one whose initials were the same as those of the alleged shipper, and that charge was made by defendant for transporting that number of bags, coupled with an admission that four were missing. This was at least sufficient to make out a *prima facie* case of loss while in the possession of defendant, and to cast upon defendant the burden of showing that the loss did not occur on its line. Willet *v.* Railway, 66 S. C. 478, 45 S. E. 93; Walker *v.* Railway, 76 S. C. 309, 56 S. E. 952.

The foregoing conclusion renders it immaterial to consider the third and fourth exceptions to the admission of testimony by the magistrate, for it may be conceded that it was error to admit in

evidence a bill of lading purporting to be issued by the Louisville & Nashville Railroad Company for 30 sacks of rice consigned by Martin J. Wynne to plaintiff, without some proof that it was in fact issued to the consignor by an authorized agent, and that it was also error to allow in evidence a bill for 30 packages of rice rendered to plaintiff by Martin J. Wynne, dated August 23, 1905, containing the words, "shipped via L. & N. Rd.," being the mere statement of Martin J. Wynne not examined in this case, still the error was harmless, as this testimony may be stricken from the record, and leave undisputed testimony sufficient to sustain a judgment for the loss of goods while in defendant's possession. Section 368 of the Code of Civil Procedure of 1902 requires that on appeals from magistrate's court judgment should be rendered according to the justice of the case, without regard to technical errors and defects, which do not affect the merits.

The first and second exceptions allege error in permitting plaintiff to testify that he had purchased 30 bags of rice from Martin J. Wynne without producing the written order and acceptance therefor admitted to be in existence. This not being a suit between plaintiff and Martin J. Wynne touching the purchase of the rice; and, defendant's liability being dependent not upon such contract of purchase, but upon its possession for transportation of goods consigned to plaintiff, the contract in question involved merely a collateral matter, as to which parol testimony was admissible. Elrod *v.* Cochran, 59 S. C. 470, 38 S. E. 122.

The ninth exception assigns error in not reversing the judgment of the magistrate for the statutory penalty, after having held that the claim in question arose out of an interstate shipment, and that the penalty statute was invalid as to interstate shipments. What the circuit court really held was that the terms of the proviso of the act of 1903 were invalid in so far as they refer to commerce between the states, under the authority of Central of Georgia R. R. *v.* Murphy, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, but that defendant could not avail itself of the invalidity of this proviso, as the evidence showed that defendant was in possession of the goods lost; in other words, that the penalty statute of 1903 does not violate the interstate commerce law in so far as it applies to commerce carriers in this state in whose possession the goods are lost or damaged. The Georgia statute, which was condemned in the Murphy Case as an unlawful interference with interstate commerce, imposed upon the initial or connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper in writing when, where, and how, and by what carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established. The distinction between

the Georgia statute and our statute (Civ. Code 1902, § 1710) is pointed out in Skipper *v.* Seaboard Air line, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, which sustained section 1710 as not violative of interstate commerce. We are, however, not to consider the validity of section 1710, but we are to consider the validity of the act of 1903 (24 St. at Large, p. 81) as applied to interstate shipments. The statute, by its title, is "An act to regulate the manner in which a common carrier doing business in this state shall adjust freight charges and claims for loss of or damage to freight." Section 2 provides "that every claim for loss of or damage to freight while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: provided, that no such claim shall be filed until the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902." The last proviso, as the circuit court correctly held, has no application to carriers into whose possession the goods have come. Construing the statute in Seegers *v.* Railway, 73 S. C. 71, 52 S. E. 797, the court said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end."

While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no

unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and, in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages. No penalty can attach except upon the establishment in a court of a default imposed by statute. The statute does not attempt to regulate interstate commerse, and imposes no tax or burden thereon. It is supported by the general principle declared in Sherlock *v.* Alling, 93 U. S. 99, 104, 23 L. Ed. 819, and enforced in Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, and Nashville, etc., R. R. *v.* Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, that state legislation "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit." In the case of Western Union Tel. Co. *v.* James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, a statute of Georgia requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith, and diligence, under penalty of $100 in each case, in the absence of legislation by Congress on the subject, was held not to be an unwarrantable interference with interstate commerce as to messages without the state.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

LOUISVILLE & N. R. Co. *v.* MINK.

(Court of Appeals of Kentucky, June 26, 1907.)

[103 S. W. Rep. 294.]

Carriers—Delay in Transportation—Damages.*—For delay of a carrier in delivering freight, there may be recovered not only such damages as normally result therefrom, but such as result from special circumstances known to the carrier at the time of the contract.

Same—Special Circumstances—Notice to Carrier.—Where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which the damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.

Same—Authority of Agents—Acquiescence—Estoppel.—Though the agent of a carrier at a certain station resigned, and his resignation was accepted, yet, no one else having been appointed for a year, and the company having in the interim left the station keys with him, and he having personally seen to billing freight, though he did not sign the bills of lading, and no notice of his discharge having been given the public, but he having been permitted to act substantially as he had done before, the carrier was estopped by its acquiescence to question his authority as agent as between it and shippers who dealt with him.

Same—Damages—Evidence.*—Plaintiff, in an action against a carrier for delay in transporting machinery for its sawmill, cannot by way of damages show loss from inability to fill a contract for lumber, because of the delay in transportation, in the absence of evidence that the carrier was notified of the fact of such contract.

Appeal from Circuit Court, Rockcastle County.
"To be officially reported."

Action by H. M. Mink against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

John T. Shelby and *J. W. Brown,* for appellant.
C. C. Williams, for appellee.

O'REAR, C. J. This was an action for damages against a common carrier by the owner of a sawmill, who shipped parts of the machinery and engine from Rockcastle county to a point in

*See foot-notes appended to Milhous *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 779, 45 Am. & Eng. R. Cas., N. S., 779.

Ohio for repair and return. The carrier negligently delayed the return shipment, so that the articles were lost for about two months. The plaintiff alleged that by reason of delay a certain quantity of logs which he had on hand deteriorated in quality, to his damage in the sum of $1,000; also, that he had lost two valuable customers, whose orders he could not fill because he could not operate his sawmill without the machinery delayed in shipment, and thereby he suffered a further damage of $250. As to the measure of damages recoverable, the court instructed the jury as follows: "(2) The court instructs the jury that the criterion of damages is the difference in value of the logs plaintiff would have sawed on his mill during the time said engine cylinder and valve were unreasonably delayed, and the value of said logs at the time plaintiff could saw same after receiving said engine cylinder and valve rod. (3) Unless the jury believe from the evidence that the defendant railroad company, through or by some one of its duly authorized agents, or party acting as such agent, it was notified of the special importance of the shipment of the engine cylinder and valve rod to the plaintiff, the jury should find for the plaintiff only nominal damages."

The leading case as authority on this subject is Hadley *v.* Baxendale, 9 Ex. 341. The principles announced therein have been applied both in England and America with varing consistency ever since the opinion was rendered. Its interpretation has not always been the same; but the weight, and it may be said the result, of innumerable cases in which it has been followed since, settle the principle to be that in any breach of a contract the plaintiff may recover always such damages as normally result therefrom, or he may, by showing special facts to have been known to the defendant at the time of the contract, which would give notice to him that a breach of the contract would result in an otherwise unexpected loss, recover his special damages. Hadley *v.* Baxendale was very much like the case at bar. The plaintiffs were owners of a steam mill. A shaft of their machinery was broken. They gave it to the defendant, a carrier, to take to an engineer to serve as a model for a new one which he was to make. Defendant's clerk was informed, when the contract was made for shipping the shaft, that the mill was stopped, and that the shaft must be sent immediately. The carrier delayed the delivery, and, in an action for the breach of the contract, plaintiff's claimed, as special damages, the loss of profits while the mill was kept idle. In the course of the opinion this rule was laid down: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, form such

breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated; but, on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract, for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract." The same principle was soon thereafter applied on this side by the Court of Appeals of New York, in Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718. The same court, in Booth *v.* Spuyten Duyvel R. M. Co., 60 N. Y. 487, thus stated the rule: "It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly."

The object of every rule on the subject is to ascertain that damage resulting from the breach which the parties, at the time the contract of affreightment was made, presumably had in mind. "Damage" means loss. Compensation would be inadequate that did not cover the loss sustained. It might be, in such a case as we have at bar, the deterioration of material on the mill owners' hands which was occasioned by the delay; but he might be entitled to more than his sound material, or its equivalent in money, for his object in having the material was to manufacture it into planks for sale. If he had a market for the lumber when so made, or contracts of sale already entered into, his profits, which were lost by reason of the delay in delivering the parts of the machinery, are recoverable upon the same grounds as is the depreciated value of his logs. Both items of damage grow out of the same breach, and together constitute the loss sustained by reason of it. Each of these elements is special damage. Each is a consequence of the breach, though it may not be said to be

a normal consequence, because it is not a necessary consequence. It is a natural consequence of the breach only in the light of the circumstances communicated to the defendant at the time the contract was entered into. Having in mind that the parts of machinery are detached from a sawmill, which was being operated, but was shut down while the detached parts were sent away for repair, it naturally follows that an unreasonable delay in the shipment of the article by the carrier would necessitate the mills standing idle the while, and that saw logs on hand which were subject to deterioration would depreciate in quality if the delay should be protracted. It would also naturally follow that if the mill owner had contracted to deliver lumber to builders, or wholesalers, for present delivery, an unreasonable delay would result in damages to the mill owner, because he would either lose his contracts, or their profits, or be compelled by his vendees to pay damages for the failure to deliver the lumber when it was due; but unless the carrier had notice of the conditions at the mill when it undertook to carry the article, it would not be in mind, or be a probability in the mind of the parties, that a failure to deliver the article promptly would entail either a loss of the logs, or the loss of sales of lumber to be cut from the logs.

Advancing to the next step, the notice mentioned: When and to whom should it be given, and what should it contain? As may be gathered from what has already been said, and particularly from the authorities cited, the recovery of special damages is allowed because it was within the contemplation of the parties to the contract, and is deemed to have been in such contemplation, because, having had notice of the peculiar conditions existing when it was made, the natural presumption would be that the particular loss actually sustained was to be reasonably apprehended from the defendant's breach of the contract. Hence special damages are recoverable upon the theory that they arise out of the contract. That being so, the contract must contain the essential elements to entitle the plaintiff to recover for them. One essential is the notice of the special conditions. This is bound to be so, because otherwise it would not be at all likely, and not always possible, that the parties should have had in mind the special result, as a natural or probable result of the breach. The notice is not to vary the terms of the contract, but is receivable as evidence of the surroundings of the parties, that the court may view their contract, in interpreting its terms, in the same light that the parties probably did when they entered into it. Hydraulic Eng. Co. *v.* McHaffie, 4 Q. B. Div. 670. Of course, if the contract provides expressly for the recovery of particular damages, which is not a limitation upon the common-law liability of the carrier against its own negligence, that would be enough in itself; but we are speaking of the implied obligation

of the carrier, which enters into every contract of affreightment, that it will pay the party aggrieved—shipper or consignee—the damages which are the natural and proximate result of its breach of the contract if it breaks it, and as to what are the natural damages within the contemplation of the law, as we have seen, will depend on the notice of the conditions existing when the contract may be entered into. It should contain such matter as would reasonably and naturally inform the carrier of the conditions and of the probable effect of its failure to comply promptly with its part of the agreement, so that it would take such measures as would enable it to comply. The notice should be given, or be in the mind of the carrier and shipper, at the time when the contract is entered into, if it is to form a part of their contract. It should be given to the carrier. As in this country the great bulk of commerce being handled by common carriers is carried by railroad corporations, whose work is in the hands of a great number of people, the notice to such carrier should be to that agent or servant whose office and duty it is to make the contract upon which the claim for loss is based. The business of railroads is so enormous, in its very nature requiring promptitude and system in handling it, that it necessitates the dividing up the work, and putting a part into one or more agents' hands for attention. It is physically impossible for one man to know or to direct the transactions of a modern railroad carrier. Hence notice to one servant as to a matter foreign to his duties is not deemed, as it is not in truth, notice to the corporation of the fact contained in it. So a notice to an agent at station A. that freight which was to be shipped from station B., where there was another agent in charge, was of a peculiar kind, or that the conditions requiring its prompt handling were so exceptional as to entail special damages, if it was not so handled, would not be notice of such condition to the carrier. We deduce from the reasoning in the authorities, and as the simple right of matter, that the notice should be given, or be in the minds of both parties, when the contract of shipment is made, should be of such special matters as naturally and reasonably apprise the party to be charged of the probable special consequences of its breach, and should be given to the carrier (if a natural person), or to that agent who entered into the particular contract, or under whose authority it was made. We do not mean to be understood as saying that, for a tort of the carrier in failing to deliver freight, it may not be liable because of notice to an agent other than the one with whom the contract of shipment was made.

Applying these principles to the facts of our case here, we find that there is no evidence of notice having been given to appellant's agent at Cincinnati, Ohio, where the cylinder and rod were delivered to it for return to appellee. There is no complaint that the outward shipment by appellant was not promptly ex-

ecuted; but the charge is that the articles were delivered to appellant in Cincinnati, Ohio, by a connecting carrier, on May 16, 1904, to be carried by appellant to Mullins Station, in Rockcastle county, Ky. and that it failed for 66 days thereafter to deliver the said machinery, whereas, two days was a reasonable time within which to have delivered it. Now, it is not shown by any evidence that appellant's agent at Cincinnati knew, or was informed when he accepted the freight for shipment from that point to appellee at Mullins Station, that there existed any special condition that would involve special damages to appellee if the contract of shipment was breached by appellant. The evidence on the subject of notice was this: One Dooley was acting as appellant's agent at Mullins Station. He was informed at or about the time of the shipment of the machinery from Mullins Station to Ohio, for repair, that appellee was operating a sawmill in the neighborhood. He had nothing to do with the return shipment. The two shipments were entirely independent transactions, so far as this record discloses. Each shipment was a separate and complete affair, and the first was a closed incident before the second was inaugurated. The contract for it was as distinctly separate from the first as if the first had never been made. We therefore conclude that the third instruction, in fixing a liability for special damages upon appellant, if any of its agents knew of the special conditions existing at the time of the shipment, is erroneous. It is also erroneous in not limiting such knowledge or notice to an existence at or prior to the making of the contract which is in suit. Illinois Central Railroad Co. *v.* Nelson, 97 S. W. 757, 30 Ky. Law Rep. 114.

As the case must be returned for a new trial, it is proper that other matters complained of by appellant, and appearing to the court to be material, should be noticed. Dooley had been appellant's agent at Mullins Station before the outward shipment of the machinery; but he had resigned, and his resignation had been accepted. No one else was appointed for over a year. In the interim, the company left the keys of the station with Dooley, who personally saw to billing freight, although he did not sign the bills of lading. No notice of Dooley's discharge was given to the public. He was permitted to act substantially as he had done before his resignation. These acts constituted him an agent, in our opinion, so far as the public was concerned. The question of his actual authority is not so material; but his apparent authority, exercised under circumstances where appellant had knowledge of it, is enough. Appellant's acquiescence, and suffering it without disavowing it, indeed, accepting and ratifying it, estop appellant from questioning the real authority of Dooley as agent, as between it and shippers who dealt with him for the company.

There was some incompetent and irrelevant evidence admitted.

There was no evidence that appellant was ever notified of the fact that appellee had contracted to sell some of the lumber to be cut at his mill to the Covington parties. In the absence of such notice (given as indicated in this opinion), evidence of the prices at which the lumber was sold, or of the loss sustained by appellee because the contract of sale was not fulfilled, ought not to have been received. Horne *v.* Midland Railway Co., L. R. 7 C. P. 583, 8 C. P. 131; Borries *v.* Hutchinson, 18 C. B. (N. S.) 445, 463; Messmore *v.* N. Y. Shot & Lead Co., 40 N. Y. 422. Nor was it relevant that appellee was forced to sell his mill at a less price than its actual value, because he could not get back his missing machinery. If the evidence should be on another trial as it was on the last, then the jury should be instructed to award nominal damages only.

Judgment reversed, and cause remanded for a new trial under proceedings consistent herewith.

ILLINOIS CENT. R. Co. *v.* COTTER.

(Court of Appeals of Kentucky, June 20, 1907.)

[103 S. W. Rep. 279.]

Carriers—Who Are Passengers—Boarding Moving Train.*—One who attempts to board a rapidly moving train does not become a passenger, though he may have a ticket for it.

Evidence—Res Gestæ—Admissibility.†—Where plaintiff attempted to board a moving train, but, after hanging to a handrail until the train had run about 800 yards, fell, the declaration of the flagman, made when he ran back to plaintiff after the train stopped, that he could not stop the train before plaintiff fell because the signal cord was out of order, was admissible as res gestæ.

Carriers—Person Hanging on Train—Care Required.‡—Since one

*For the authorities in this series on the question whether a person was a passenger on a particular occasion before he boarded the train or street car, see Clark *v.* Durham Traction Co. (N. Car.), 24 R. R. R. 165, 47 Am. & Eng. R. Cas., N. S., 165; Pincus *v.* Atlantic Coast Line R. Co. (N. Car.), 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112.

†For the authorities in this series on the question when the declarations of railroad employees are, and are not, res gestæ, in actions against their respective companies, see foot-notes appended to Ft. Wayne, etc., Trac. Co. *v.* Crosbie (Ind.), 24 R. R. R. 749, 47 Am. & Eng. R. Cas., N. S., 749; foot-notes appended to Illinois Cent. R. Co. *v.* Houchins (Ky.), 23 R. R. R. 229, 46 Am. & Eng. R. Cas., N. S., 229.

‡For the authorities in this series on the subject of the care due

who unsuccessfully attempted to board a moving train, and after hanging to a hand rail while the train ran about 800 yards fell was not a passenger, he could not complain that the signal cord was out of order preventing the trainmen from stopping the train before he fell, since the company after discovering his peril was chargeable to use only ordinary care to avoid his injury with the means at hand.

Same.—Where a flagman, after discovering the peril of plaintiff who was hanging on the side of a moving railway train, pulled the signal cord and went into the train, got the porter, and, finding they could not pull plaintiff into a place of safety and that the train was not slowing up, they left him to make an effort to stop the train in another way, and the flagman then set the emergency brake, the flagman was not negligent, making the company liable for plaintiff's injury caused by falling before the train stopped.

Nunn, J., dissenting.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by S. R. Cotter against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Robbins & Thomas, Trabue, Doolan & Cox, J. M. Dickinson, and *R. G. Robbins,* for appellant.

Lee & Hester, for appellee.

HOBSON, J. On September 2, 1905, Rev. S. R. Cotter was at Mayfield and desired to go to Princeton. He went to the station to take the morning train. The train pulled in just before he got there. A man, who had come to the train with him and was carrying his valise, took it in the train and set it down. Cotter's statement as to what then occurred is as follows: "I ran into the waiting room and asked the agent would I have time to get a ticket. He said, 'Yes.', I went on and pulled out my book, a book something like this. I had to write the station to which I wanted a ticket. I wrote in that book 'Princeton', and signed my name and handed it back to him. He took the book, went back and made out my ticket, and handed it to me. At that time the train was moving off, and I ran out to catch the train. The colored car had got past, and I tried to reach the next one. I made an attempt to get on and grabbed those bars and made a jump. My feet missed the steps. That had me swinging. The

trespassers on trains or street cars, see foot-notes appended to Massell *v.* Boston Elev. Ry. Co. (Mass.), 21 R. R. R. 57, 44 Am. & Eng. R. Cas., N. S., 57; Graham *v.* Chicago & N. W. Ry. Co. (Iowa), 20 R. R. R. 811, 43 Am. & Eng. R. Cas., N. S., 811; foot-notes appended to Toledo, etc., R. Co. *v.* Gordon (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544.

flagman was standing in the door, and went in the car. After a little while he came back, and I asked him to stop the car. He reached up, pulled the cord, but the train was running faster, and he left and went away, went in the car. A little later he came back and a colored man, the porter, came with him, on the sleeper, and they came up and caught hold of my arm, and he held one and the porter held the other. They did not pull on me at all, just held me a while, and the colored man turned loose and went on in the car. Then he turned loose and told me to hold on, and he went in. A very short while. I told him I couldn't hold much longer. A short while after he left me my hold gave out, and I fell. Q. You say that you caught onto this car and were swinging there, and the flagman came out there and looked down at you? A. Yes, sir. Q. And you asked him to stop the train? A. I asked him to stop the train. Q. How fast was it running then? A. Pretty fast. Q. And he reached up and pulled the cord? A. Pulled the cord; yes, sir. Q. About how far had they gone then when he pulled the cord? A. A quarter of a mile, I reckon. Q. Pulled the cord, and they didn't stop then, and he went in the coach? A. Yes, sir. Q. And came back again? A. Yes, sir; came back with a colored man. They both caught my arm, one hold of one, and the other hold of the other. Finally the colored man turned loose and went back in the car. Q. And then the white man turned you loose? A. Yes, sir; and told me to hold on. Q. That was, you say, the flagman? A. Yes, sir. Q. After you fell you started to the train. Did anybody meet you? A. The flagman came running back and said to me—(Objected to.) by the Court: He may answer. (Exceptions.) A. The flagman said: 'I would have stopped that train, but the bell cord or the signal cord was out of fix, and I couldn't do it. That is why I didn't stop it.' Q. That was right after the accident, you say? A. Yes, sir."

The man who came to the station with Cotter testified as follows: "I carried the telescopes and things on in the car, and set them down. About that time Elder Cotter was getting his ticket in the office. He got his ticket and started out, and the train had gone a right smart piece. He got to the train just as the first compartment of the sleeper or dining car, and the next step was the front end of the last coach. It was open, and the Pullman porter was standing in the door, and Cotter caught the train and it throwed him around, and jerked him around a little bit. The flagman was up on the back end of the sleeper, and he looked around and saw him, and went through the coach to where he was. That was the last I saw of him, except he was going off on to the train. When he got somewhere near the crossing there at the cemetery, he broke loose and fell, but before we got there he had gotten up and gone onto the train which backed, and he got on the train and went on."

A person on the train testified as follows: "Just as the train pulled out Elder Cotter caught hold of the Pullman sleeper. It ran on until it got down there. The train was in the curve, and after a while he got from my view and passed on through that cut, so I says to the conductor, who was standing between the baggage car and the Jim Crow, I says: 'Mr. Conductor, somebody must have got killed back there, a colored man was hanging on.' He reached up and pulled the cord, the signal lever, jerked it two or three times, and the train stopped."

The train ran about 800 yards before Cotter fell off, and about 250 yards after he fell off before it stopped. On this evidence the court refused to instruct the jury peremptorily to find for the defendant, and instructed them as follows: "The court instructs the jury that if they believe from the evidence that plaintiff, S. R. Cotter, in attempting to board defendant's train on the occasion under inquiry, failed to get into a place of safety on said cars, and was hanging on to said cars with his hands in a dangerous position, and any of defendant's servants managing or operating said train knew, or were notified of plaintiff's dangerous position, in time to have stopped the train, or had it stopped, and avoid the accident and injury, but negligently failed to do so, and the train continued to run, and by reason thereof the plaintiff fell from same and was injured, if he was injured, they will find for plaintiff. The court instructs the jury that the plaintiff was guilty of negligence in attempting to board a moving train, and he cannot recover in this action unless the jury believe from the evidence the agents or employees of the defendant controlling and operating the train, after they discovered plaintiff's perilous condition, by the use of ordinary care, could have stopped the train in time to have prevented the injury to him."

Although the plaintiff had purchased a ticket for the train with the intention of going upon it, he had no right to run and jump upon it when in rapid motion. The baggage car was opposite the station office when the train stopped, and so the full length of the train practically had passed the station office before he attempted to jump upon it, and it was therefore going pretty fast. One who has made a contract for passage upon the vehicle of a common carrier must present himself at a proper place to be transported on the vehicle before his right to care and protection as a passenger on the vehicle begins. One who attempts to jump upon a rapidly moving train does not become a passenger upon the train, although he may have a ticket for it. Dodge *v.* Railroad Company, 148 Mass. 209, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; Baltimore Traction Company *v.* State, 78 Md. 409, 28 Atl. 397; Hutchinson on Carriers, § 2636.

The evidence as to what the brakeman said when he came back to Cotter after the train stopped was a part of the transaction,

and was properly admitted as *res gestæ*, as he was the first person to get to Cotter after his fall, and this statement was made by him immediately after Cotter fell. But, as Cotter was not a passenger on the train, he cannot complain that the signal cord or the brakes were not in order. He put himself upon the train when he had no right to do so, and he can only complain if the trainmen, after they discovered his peril, could by ordinary care have avoided injury to him by the means which they had at hand. The company was not bound to equip its train with such appliances as might promote the safety of persons jumping upon it at the stations when in motion. Flint *v.* I. C. R. R. Co., 88 S. W. 1055, 28 Ky. Law Rep. 1. Such persons take the train as they find it, and can only complain if ordinary care is not used for their safety after their peril is discovered. There was no evidence of negligence on the part of the conductor of the train, as manifestly he did all that he could do after he learned of the danger in which Cotter was placed. There is also a want of negligence on the part of the engineer. Whether there is any negligence on the part of the flagman after he learned of the danger in which Cotter was placed is therefore the only question left for determination.

In view of the fact that the flagman was on the back end of the sleeper, and saw Cotter hanging on at the front end just after he attempted to get on the train, and in view of the fact that the train ran something like a half a mile before Cotter fell off, there would be evidence of negligence on the part of the flagman, but for the fact that Cotter testified that the flagman reached up and pulled the cord, but the train was running faster and that he could have stopped the train, but the bell cord was out of fix. The fact that the bell cord was out of fix giving the plaintiff no right of action, it remains to determine whether there is any evidence of negligence on the part of the flagman. We think it evident that the flagman went to get the porter in the hope that they two could pull the man up from his dangerous position into a place of safety, and that, when they found that they could not do this and found that the train was not slowing up in obedience to the signal on the bell cord, they let him go to make an effort to stop the train in some other way. It appears from the evidence for the defendant that the flagman then went and set the emergency brake, but whether or not he should have set the emergency brake after pulling the bell cord or going to the man and trying to pull him on the car was a question which he had to decide on the moment, and the fact that he went to the man first, expecting the engineer to obey the signal which he had given on the bell cord, does not show negligence on his part. The rule is that, where a person has been placed in a position of peril by the negligence of another and must act in an emergency, the fact that he does not adopt the course best for his safety will

not preclude a recovery, provided he acts with such care and judgment as may be reasonably expected of a person of ordinary prudence under like circumstances. We see no reason why the same principle should not apply to the servants of the railroad company operating a train when they discover a person in a place of danger. The fact that the flagman and the porter were unable to get Cotter up was evidently due to his being a very heavy man, and that he did not have his feet on the steps as they supposed. It was entirely natural that a person of ordinary prudence seeing Cotter in this imminent peril should, after pulling the bell cord, go at once to him and endeavor to hold him so that no harm could come to him until the train could be stopped, and, when it was discovered that the train was gaining in speed, instead of stopping, it is hard to see that they could have done anything more then than set the emergency brake. Taking the evidence as a whole, we think it shows that the failure to stop the train and save Cotter from his perilous position was due to the signal cord not working. As the defendant is not responsible to him for this, a peremptory instruction should have been given.

If, on another trial, there should be evidence sufficient to take the case to the jury, the court, in lieu of the instructions quoted, will tell the jury that the plaintiff cannot recover because the bell cord or any other part of the train was out of order, but that if, after the plaintiff's dangerous position was known to the defendant's servants managing the train and if after they knew this, they could, by ordinary care with the means which they had at hand, have avoided the injury to him, the jury should find for the plaintiff; otherwise for the defendant.

Judgment reversed, and cause remanded for a new trial.

NUNN, J., dissents.

SEABOARD AIR LINE RAILWAY, Plff. in Err. *v.* A. L. SEEGERS and W. B. Seegers, Doing Business as Seegers Bros.

(Argued October 16, 1907. Decided November 4, 1907.)

[28 Sup. Ct. Rep. 28.]

Constitutional Law—Equal Protection of the Laws—Regulation of Common Carrier.*—Common carriers are not denied the equal protection guaranteed by U. S. Const., 14th Amend., by the provisions of S. C. act February 23, 1903, p. 81, § 2, requiring them to adjust and pay every claim for loss or damage to an intrastate shipment within forty days after the filing of a claim, under penalty of $50 for each failure or refusal, where there can be no award of a penalty under the statute unless there is a recovery of the full amount claimed.

In error to the Supreme Court of the State of South Carolina to review a judgment which reversed a judgment of a Circuit Court of the state, reversing a judgment of the Magistrate's Court in the County of Chesterfield, assessing a penalty against a common carrier for its failure to adjust and pay a claim as required by statute, and affirmed the judgment of the Magistrate's Court. Affirmed.

See same case below, 73 S. C. 71, 52 S. E. 797.

The facts are stated in the opinion.

Messrs. W. F. Stevenson, Edward McIver, and *Stevenson & Matheson* for plaintiff in error.

No counsel appeared for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court:

The question in this case is the constitutionality of § 2 of an act of the state of South Carolina, approved February 23, 1903 (24 Stat. at L. 81), which reads:

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, That no such claim shall be filed until after the arrival

*For the authorities in this series on the subject of the constitutionality of statutes prescribing penalties to compel carriers to perform their duties, etc., see foot-notes appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420; foot-notes appended to Lexington Grocery Co. *v.* Southern Ry. Co. (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349, where all the preceding authorities are collected.

of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of $50 for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any court of competent jurisdiction: Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of §1710, vol. 1, of the Code of Laws of South Carolina, 1902."

The difference between the value of the goods shipped and the freight charges, $1.75, and the amount of the penalty, $50, naturally excites attention. The supreme court of the state held the section constitutional—a decision conclusive so far as the state Constitution is concerned—and therefore we are limited to a consideration of its alleged conflict with the Constitution of the United States. The shipment was wholly intrastate, being from Columbia, South Carolina, to McBee, South Carolina, and undoubtedly subject to the control of the state. It is, of course, unnecessary to consider the validity of the statute when applied to a shipment from without the state.

It is contended that the equal protection of the laws, guaranteed by the 1st section of the 14th Amendment, is denied. The power of classification is conceded, but this will not uphold one that is purely arbitrary. There must be some substantial foundation and basis therefor. It is asserted that this is merely legislation to compel carriers to pay their debts within a given time, by an unreasonable penalty for any delay, while no one else is so punished, and that there is no excuse for such distinction. We have had before us several cases involving classification statutes, and while the principles upon which classifications may rightfully be made are clear and easily stated, yet the application of those principles to the different cases is often attended with much difficulty. See, among others, on the general principles of classification, Barbier *v.* Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Bell's Gap R. Co. *v.* Pennsylvaina, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, and of cases making application of those principles: Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 43 L. ed. 909, and cases in the opinion; Erb *v.* Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep.

819; Fidelity Mut. Life Asso. *v.* Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Farmers' & M. Ins. Co. *v.* Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Missouri, K. & T. R. Co. *v.* May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the nonpayment of debts. As the supreme court of South Carolina said in Best *v.* Seaboard Air Line R. Co., 72 S. C. 479, 484, 52 S. E. 223, 225:

"The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about prompt settlement of all proper claims, the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary."

This ruling of the supreme court finds support, if any be needed, in the preamble of the statute, which reads: "An Act to Regulate the Manner in Which Common Carriers Doing Business in This State Shall Adjust Freight Charges and Claims for Loss of or Damage to Freight."

It is not an act leveled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guaranty against excessive claims in that, as held by the supreme court of the state in Best *v.* Seaboard Air Line R. Co. *supra,* there can be no award of a penalty unless there be a recovery of the full amount claimed.

Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the state forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, can-

not be adjudged unconstitutional as a purely arbitrary classification.

While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go even in cases where classification is legitimate; but we are not prepared to hold that the amount of penalty imposed is so great, or the length of time within which the adjustment and payment are to be made is so short, that the act imposing the penalty and fixing the time is beyond the power of the state.

The judgment of the Supreme Court of South Carolina is affirmed.

MR. JUSTICE PECKHAM dissents.

STRANGE *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, June 4, 1907.)

[57 S. E. Rep. 724.]

Carriers—Baggage—Delay in Delivery—Evidence.*—In an action for delay of carrier in delivering baggage, the owner thereof may testify that he contracted with the carrier to transmit to a certain point without producing his check.

Same—Special Damages.†—A passenger cannot recover special damages for a failure to deliver his baggage in time, unless the carrier had notice of the special circumstances at the time of receiving the baggage.

Same—Measure of Damages.†—In an action for delay in delivery

*See note by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., p. xxxiv.

†See extensive note, 10 R. R. R. 505, 33 Am. & Eng. R. Cas., N. S., 505; Milhous *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 779, 45 Am. & Eng. R. Cas., N. S., 779 (in action for delay in delivering baggage containing dental tools, there could be no recovery for what passenger would have made by working at his profession); Turner *v.* Southern Ry. (S. Car.), 21 R. R. R. 288, 44 Am. & Eng. R. Cas., N. S., 288 (measure of damages for loss of baggage as

of baggage, which the carrier accepts with notice that the passenger requires it at a certain place at a certain time for a special purpose, the measure of damages is the injury to the special business attributable to the delay, including the expense and loss of time incurred in a search for the delayed baggage.

Appeal from Common Pleas Circuit Court of Clarendon County; Gary, Judge.

Action by Riley M. Strange against the Atlantic Coast Line Railroad Company. From an order of the circuit court dismissing appeal from a magistrate, defendant appeals. Affirmed.

J. T. Barron and *Wilson & Du Rant,* for appellant.
W. C. Davis, for respondent.

WOODS, J. 1. The plaintiff, a traveling salesman, recovered a judgment of $65 in the court of Magistrate Youmans for delay in the transportation from Columbia to Manning of a trunk containing samples. The circuit court affirmed the judgment of the magistrate. The plaintiff delivered two trunks to the defendant's agent at Columbia, intending to have them checked to Manning, and he testified the checks were actually so issued. Evidence was introduced on behalf of the defendant to the effect that one of the trunks was checked to Manning and the other to Sumter. The baggage agent at Columbia did not testify, and the defendant made no effort to explain the mistake which it alleged had been made in checking one of the trunks to Sumter, instead of Manning. Certainly there was no evidence that the plaintiff had asked for a check to Sumter, even if he assume the check had written on it Sumter, instead of Manning. It cannot be said, as a matter of law, that the plaintiff should bear the consequences because he failed to examine the checks and observe and have corrected the defendant's error. In the case of Isaacson *v.* Railway, 94 N. Y. 278, 46 Am. Rep. 142, which was very similar to this case, the court said: "In this case the request to check over the Mobile route was made to the baggage master and assented to by him,

affected by fact that carrier had no notice of special circumstances); Wehman *v.* Southern Ry. (S. Car.), 20 R. R. R. 721, 43 Am. & Eng. R. Cas., N. S., 721 (sufficiency of notice to subject carrier to special damages); Chicago, etc., Ry. Co. *v.* Anderson (S. Car.), 19 R. R. R. 332, 42 Am. & Eng. R. Cas., N. S., 332 (general rule as to measure of damages for delay in delivery of baggage); Eller *v.* Carolina & W. Ry. Co. (N. Car.), 18 R. R. R. 609, 41 Am. & Eng. R. Cas., N. S., 609 (mental anguish of prospective groom caused by injury to trouseau of his bride to be, was too remote a form of damage to entitle groom to recover therefor against railroad, which did not know of intended marriage); Seaboard Air Line Ry. *v.* Harris (Ga.), 15 R. R. R. 285, 38 Am. & Eng. R. Cas., N. S., 285 (loss of profits by traveling salesman, caused by want of delayed samples, was too remote and speculative).

and he assumed to give checks in accordance with the request. This constituted, we think, an agreement binding on the company, and, unless the plaintiff's omission to examine the checks was contributory negligence, we are of the opinion that the nonsuit was erroneous. The primary purpose of giving the passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never, we think, been regarded as embodying the contract of carriage, but only as a voucher or token for the purpose mentioned. See Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. 469; Van Buskirk *v.* Roberts, 31 N. Y. 661; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Rawson *v.* Penn. R. R. Co., 48 N. Y. 212, 8 Am. Rep. 543. The plaintiff had a right to repose upon the representation of the baggage master, without examining the checks." See, also, Hutchinson on Carriers, § 1302, and note. It was competent for the plaintiff to testify that he actually contracted with the defendant to transport the trunk to Manning, and not to Sumter, without producing the check, and the exception on this point cannot be sustained.

2. There was error in receiving plaintiff's testimony as to a conversation with defendant's agent after the loss of the trunks, in which he gave notice of his business as a traveling salesman. Special damages for losses arising from failure to deliver goods cannot be recovered, unless the defendant has notice of the special circumstances at the time of shipment. Traywick *v.* Railway Co., 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; Wesner *v.* Railway Co., 71 S. C. 211, 50 S. E. 789; Guess *v.* Railway Co., 73 S. C. 264, 53 S. E. 421. But this error was immaterial, as plaintiff testified defendant's agent, who received the trunks, had frequently checked them for him, and knew the kind of business in which he was engaged, and this evidence was not disputed.

3. The main contention of the defendant is that the magistrate erred in admitting evidence of the interruption of the plaintiff's business by reason of the failure of the defendant to deliver promptly at Manning the trunk containing his samples. As we have seen, there was evidence that the defendant, when the trunks were received, knew the business of the plaintiff was to sell goods by sample as a traveling salesman, and this was notice that delay of his samples would probably result in an interruption of his business and loss of time. When the carrier accepts goods for transportation, with notice that the owner requires them at the place to which they are to be carried for a special business purpose, the measure of damages for delay in carriage is the expense and detriment to the special business with reference to which the carriage was undertaken fairly attributable to the delay, including expense and loss of time reasonably incurred in the effort to find the delayed property. This does not include the speculative profits resting on the mere hope of particular future transactions. Webb *v.* Railroad, 76 S. C. 199, 56 S. E. 954; Hutchinson on

Carriers, § 1370; Moore on Carriers, § 410; Wood *v.* Maine Cent. R. Co., 99 Am. St. Rep. 386, note; Norris *v.* Savannah, etc., Ry. Co., 11 Am. St. Rep. 366, note; Turner *v.* Railroad, 75 S. C. 58, 54 S. E. 825; Hays *v.* Tel. Co., 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731.

The damages proved by the plaintiff here were not based on particular sales the plaintiff hoped to make. His evidence was properly directed to the fair average daily earnings in his business. This he testified was from $20 to $25 per day, and that the trunk was delayed three days. In addition to this, there was evidence of the expenditure of $8.30 in the effort to find the trunk. The judgment was for $65, and this was obviously well supported by the evidence above recited of items of damages flowing naturally and proximately from the interruption of plaintiff's business, consequent on the delay of his trunk of samples. Inasmuch as there was evidence of notice to the defendant of the nature of the plaintiff's business, the case has been considered as if such notice were necessary by a traveling salesman for the recovery of such damages as were allowed in this case. We do not mean to say, however, that such damages might not be recovered by a traveling salesman under the principles laid down in Fleischman *v.* Railway, 76 S. C. 237, 56 S. E. 974, without proof of special notice that the owner of the trunks was a traveling salesman carrying them for use in his business.

It is the judgment of this court that the judgment of the circuit court be affirmed.

SOUTHERN RY. CO. *v.* COLEMAN.

(Supreme Court of Alabama, Nov. 14, 1907.)

[44 So. Rep. 837.]

Appeal—Rulings on Motion to Strike Items from Complaint—Overruling Demurrer—Review.—Error cannot be predicated on the refusal of the court to strike items of damages from the complaint, and on the overruling of a demurrer to the complaint on the ground that such items are not recoverable, as defendant may raise the same points by objections to evidence, exceptions to the charge authorizing such recovery, and by special charges.

Damages—Breach of Contract or Duty—Measure of Damages.—A party, injured by a breach of contract or breach of duty, may recover all his damages, including gains prevented and losses sustained, subject to the independent conditions that the damages must flow directly and naturally from the breach, and must not be speculative or contingent.

Southern Ry. Co. *v.* Coleman

Carriers—Delay in Shipment—Damages—Recovery.*—An owner of a public ginnery delivered a part of the machinery to a carrier for transportation to a designated point, to be repaired by the consignee. The carrier delayed the delivery of the machinery. The owner testified that 75 cents was a fair profit for ginning a bale of cotton, but he could only estimate the number of bales that went to his gin during the days his plant was shut down in consequence of the delay. The 75 cents profit depended on contingencies. Held, that the owner was entitled to nominal damages only; the estimate of what he might have earned by operating the gin, had the shipment been promptly delivered, being speculative.

Same.—Where the period a public ginnery was stopped, in consequence of the failure of a carrier to promptly transport and deliver a part of the machinery thereof was so short that the ginnery had no rental value, interest on its value for that period is the proper measure of damages, if claimed.

Same.*—A shipper, suing a carrier for delay in the transportation

*For the authorities in this series on the subject of the measure and elements of damages for delay in transporting or delivering freight, see extensive note, 10 R. R. R. 481, 33 Am. & Eng. R. Cas., N. S., 481; Outland *v.* Seaboard A. L. Ry. Co. (N. Car.), 10 R. R. R. 476, 33 Am. & Eng. R. Cas., N. S., 476; Illinois Cent. R. Co. *v.* Johnson & Fleming (Tenn.), 20 R. R. R. 727, 43 Am. & Eng. R. Cas., N. S., 727 (mere delivery of iron pipe for the boring of a well to a carrier for transportation was insufficient of itself to give notice to the carrier of the existence of a time contract between the consignee and the owner of the well which would probably be affected by delay in the delivery of the material); Choctaw, O. & G. Ry. Co. *v.* Rolfe (Ark.), 16 R. R. R. 525, 39 Am. & Eng. R. Cas., N. S., 525 (shipper had right to keep teams necessary for loading on expense while waiting for carrier's performance of agreement to furnish cars; and on its failure to furnish cars was entitled to recover such expense as special damages); Crutcher *v.* Choctaw, O. & G. R. Co. (Ark.), 16 R. R. R. 661, 39 Am. & Eng. R. Cas., N. S., 661 (carrier, to be liable for special damages for delay in the transportation of freight, must have had notice, before or at the time shipping contract was made, of the special circumstances. It is not enough that it received such notice during the delay); Ryland & Rankin *v.* Chesapeake & O. Ry. (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279 (delay does not constitute conversion of freight so as to make carrier liable for its value; Traywick *v.* Southern Ry. Co. (S. Car.), 17 R. R. R. 678, 40 Am. & Eng. R. Cas., N. S., 678 (delay in delivery of machinery, where carrier had no notice as to purpose for which it was needed); Lee & Co. *v.* St. Louis, etc., Ry. Co. (N. Car.), 14 R. R. R. 260, 37 Am. & Eng. R. Cas., N. S., 260 (only damages contemplated by the parties are recoverable); Weston *v.* Boston & M. R. R. (Mass.), 19 R. R. R. 718, 42 Am. & Eng. R. Cas., N. S., 718 (delay in transportation of theatrical properties); Louisville & C. P. Co. *v.* Bottorff (Ky.), 13 R. R. R. 263, 36 Am. & Eng. R. Cas., N. S., 263 (duty of consignee to obtain substitute for delayed machinery); Carpenter *v.* Baltimore & O. R. Co. (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679 (depreciation in value of freight after its arrival at its destination and consignee had refused

and delivery of a shipment, cannot recover the expenses incurred by him on a trip to the point of destination to look after the shipment.

Same.—Proof that the agent of a carrier at the destination of a shipment did not locate the car in which the same was is proof of simple negligence only, and does not authorize exemplary damages for delay in the delivery of the shipment.

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Action by B. W. Coleman against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Exceptions were reserved to the following oral charge of the court: "The second count not only charges that it did not get it there in a reasonable time, but that it was willfully and intentionally delayed. Was it intentionally or purposely delayed? That would amount to gross or wanton negligence. That is a question for you to look after. If it did not deliver it there in a reasonable time, and did not exercise reasonable diligence, it would be liable for the actual damages

to receive it); Louisville & N. R. Co. *v.* Hull (Ky.), 3 R. R. R. 56, 26 Am. & Eng. R. Cas., N. S., 56 (mental suffering from delay in shipment of corpse); Wessner & White Mfg. Co. *v.* Atlantic Coast Line R. R. (S. Car.), 19 R. R. R. 342, 42 Am. & Eng. R. Cas., N. S., 342 (sufficiency of complaint); Ryland & Rankin *v.* Chesapeake & O. Ry. Co. (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279; Webb *v.* Southern Ry. Co. (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26 (loss of weight and market value of cattle during delay were recoverable under count in Code form, in absence of stipulation in contract for different measure of damages); Sloop *v.* Wabash R. Co. (Mo.), 2 R. R. R. 937, 25 Am. & Eng. R. Cas., N. S., 937 (measure of damages for failure to deliver stock within reasonable time); Chicago, B. & Q. Ry. Co. *v.* Todd (Neb.), 19 R. R. R. 113, 42 Am. & Eng. R. Cas., N. S., 113 (refusal to receive and transport stock, expense of keeping stock and difference in market value); Patterson *v.* Illinois Cent. R. Co. (Ky.), 24 R. R. R. 434, 47 Am. & Eng. R. Cas., N. S., 434 (delay in transportation of meal intended for plaintiff's cattle, special damages not recoverable because carrier had no notice of special circumstances); Norfolk & W. Ry. Co. *v.* Wilkinson (Va.), 23 R. R. R. 290, 46 Am. & Eng. R. Cas., N. S., 290 (measure of damages where loss of sale of lumber at agreed price); Webb *v.* Atlantic Coast Line R. Co. (S. Car.), 23 R. R. R. 284, 46 Am. & Eng. R. Cas., N. S., 284 (delay in delivering drummer's samples); Milhous *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 779, 45 Am. & Eng. R. Cas., N. S., 779 (delay in delivery of baggage containing dental tools); Baltimore & O. R. Co. *v.* Whitehill (Md.), 22 R. R. R. 176, 45 Am. & Eng. R. Cas., N. S., 176 (delay in transporting cattle intended for certain market); Choctaw, etc., R. Co. *v.* Jacobs (Okl.), 21 R. R. R. 761, 44 Am. & Eng. R. Cas., N. S., 761 (general statement as to measure and elements of damage); Illinois Cent. R. Co. *v.* Holt (Ky.), 21 R. R. R. 455, 44 Am. & Eng. R. Cas., N. S., 455; Yazoo, etc., R. Co. *v.* Christmas (Miss.), 21 R. R. R. 451, 44 Am. & Eng. R. Cas., N. S., 451.

plaintiff suffered. Do you believe it did not, and that this iron was used in the ginning, and that the gin was shut down? If so, it would be liable, then, for the profits arising from the ginning of cotton and the gin from the time it should reach Selma and the iron works company received it—from that time until they actually received it. It would be further liable, gentlemen of the jury, if you find it was necessary for plaintiff in this case to go to Selma, and find the press pin, and help to deliver it, and you further find that it did not exercise reasonable diligence in delivering it there, defendant would be liable for the actual expenses of plaintiff in going to Selma to help deliver it. Under the second count of the complaint it is charged that the defendant willfully or wantonly failed to deliver the goods or carry out the contract in a reasonable time. The law says that as punishment, what they call 'punitive damages;' and if you do not believe that they delivered within a reasonable time, and are guilty of such negligence as would amount to gross negligence, you have a right under the second count, if you believe the evidence, to give punitive damages." Among other charges the defendant requested the following charge, which was refused: "(21) I charge you, gentlemen of the jury, that under the evidence in this case you cannot find for the plaintiff for more than nominal damages." The first count was in simple, and the second count in wanton or willful, neglect of duty.

Pettus, Jeffries & Pettus, for appellant.
De Grafferreid & Evins, for appellee.

DENSON, J. This suit was brought to recover damages alleged to have accrued to the palintiff on account of a failure on the part of the defendant, a common carrier of goods, to promptly deliver a press pin to the Union Iron Works, in Selma, Ala. The case, briefly stated, is this: The plaintiff owned and operated a public ginnery at Sawyerville, a station on the Southern Railway distant 56 miles from Selma. On the 13th of October 1904, his press pin, a part of the machinery of his ginnery, being in such condition that it could not be used, plaintiff delivered it to the defendant's agent at Sawyerville, to be shipped to the Union Iron Works in Selma, there to be immediately repaired by that concern and shipped back to the plaintiff. At the time of the delivery of the pin to defendant's agent for shipment, plaintiff told him that the pin was a part of the machinery of his ginnery, that the ginnery could not be operated until the pin was repaired, and that he was sending it to the consignee for immediate repair and return, and that his ginnery would be "at a standstill" until the pin should be repaired and returned. The pin was shipped in a certain car on the same day it was delivered for shipment, but through the negligence of the defendant's agents at Selma it was not delivered to

the consignee until the 20th of October, 1904, and not until the plaintiff went to Selma on that day and located the car it was in. When the pin was located, it was repaired within three hours by the consignee, and was returned to the plaintiff by express on the following day.

The only points of serious contest in the cause arise in respect to the measure of damages on account of the failure to promptly deliver the pin to the consignee in Selma, or to deliver it within a reasonable time; plaintiff's contention, which prevailed in the court below, being that he was entitled to recover as damages the profits which he would have made on ginning cotton, the ginning of which was lost to him by the breach of the defendant's duty in not delivering the pin at Selma within a reasonable time, together with the expenses incurred by plaintiff in going to Selma to procure the delivery of the pin. The court overruled defendant's motion to strike these items of damages from the complaint, and overruled a demurrer to the complaint making the point that they were not recoverable. Error cannot be predicated of these rulings, as the defendant could have raised the same points, as it has done, by objections to evidence, exceptions to the oral charge of the court authorizing such recovery, and by special charges. Vandiver & Co. *v.* Waller, Adm'x, 143 Ala. 411, 39 South, 136, and authorities there cited.

The broad general rule is that a party injured by a breach of contract or breach of duty is entitled to recover all his damages, including gains prevented as well as losses sustained, subject to two conditions: The damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, or when the duty was assumed or imposed—that is, the damages must be such as might be expected to follow its violation; and they must be certain, both in their nature and in respect to cause from which they proceed. The familiar rules on the subject are all subordinate to these; for instance, that the damages must flow directly and naturally from the breach is a mere mode of expressing the first, and that they must be, not the remote, but the proximate, consequences of such breach and must not be speculative or contingent, are different modifications of the last. These two conditions are entirely separate and independent, and to blend them tends to confusion. Thus the damages claimed may be the ordinary and natural, and even necessary, result of the breach; and yet, if in their nature uncertain, they must be rejected. So they may be definite and certain, and clearly consequent upon the breach, and yet, if such as would not naturally flow from such breach, but for some special circumstances, collateral to the contract or duty itself, or foreign to its apparent object, they cannot be recovered. Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718. In the case *supra*

it is said by Selden, J., for the court: "Cases not infrequently occur in which both these conditions are fulfilled, where it is certain that some loss has been sustained or damage incurred, and that such damage or loss is the direct, immediate, and natural consequence of the breach of contract or duty, but where the amount of damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts the mode of estimating the damages which is most definite and certain. The case of Freeman *v.* Clute, 3 Barb. 424, is a case which affords an apt illustration of the rule. The contract there was to construct a steam engine to be used in the process of manufacturing oil, and damages were claimed for delay in furnishing it. It was insisted that the damages were to be estimated by ascertaining the amount of business which could have been done by the use of the engine and the profit that would have thence accrued. The claim was rejected. But the court held that compensation was to be allowed for the loss of the plaintiff's mill and other machinery." And this loss, it was held, should be predicated upon the fair rent or hire of the mill and machinery.

The foregoing principles have been frequently applied by this court. Thus in Nichols *v.* Rasch., 138 Ala. 372, 35 South. 409, it is said by Sharpe, J., for the court: "Ordinarily a loss of profits resulting proximately from a breach of contract, when it is such as can be definitely ascertained by proof, and which the parties in the formation of the contract must have contemplated would flow from its breach, may be recovered in an action for the breach; but the profits which were merely possible or probable of accretion from the business in which the defendant was engaged were in large measure speculative, subject to contingencies, and incapable of being proved with the degree of certainty which the law requires to constitute recoverable damages." So in Watson *v.* Kirby, 112 Ala. 436, 446, 20 South. 624, 628, there were existing contracts for the sale of lumber at a profit, of which the plaintiff had knowledge at the time he entered into a contract to furnish logs to defendant's mill; and the defendant sought to recoup the profits which he failed to realize on account of plaintiff's failure to furnish the logs. The court, through Head, J., said: "What defendant's general profits for running the mill so short a time would amount to would be mere speculation. If, in any case, they can safely and justly be allowed, they cannot in this." See the numerous cases cited by Judge Head in support of the ruling. Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 628, 10 South. 333; Moulthrop & Stevens *v.* Hyett & Smith, 105 Ala. 493, 17 South. 32, 53 Am. St. Rep. 39.

Without further discussion of the cases, it seems to us that the evidence offered in the present cause to sustain the plaintiff's

claim for profits demonstrates that there should be no such recovery. The plaintiff testified that 75 cents was a fair profit for ginning a bale of cotton; but he testified that he could not swear how many bales went to his gin during the few days his plant was shut down. He could only estimate it. He could not swear that there were 100, nor that there were 75, nor could he give the name of a single person who carried cotton to the gin during the time. Furthermore, the 75 cents profit was shown to depend on many contingencies. We do not see how the conclusion can be avoided that the evidence shows the plaintiff was measuring his damages by estimating what he might have earned by the use of the pin in connection with his other machinery, had the shipment been promptly delivered. Hence it is shown that the profits claimed fall within the rule that damages, to be recoverable, must not be speculative or contingent. Authorities *supra*.

It will be seen that the oral charge of the court, in respect to the right of the plaintiff to recover such profits as damages, is not in harmony with our conclusion, and also that the court erred in refusing charge 3 requested in writing by the defendant. The court further erred in admitting proof of such profits as an element of damages. It would seem that if the ginnery was stopped for any appreciable length of time—that is, a period in which it could be reasonably said that the gin outfit had a rental value—then the rental value of the ginnery during delay caused by defendant's breach of duty would be the just and reasonable rule of damages in the case. But, if the period was so short that the ginnery had no rental value, then, as intimated in Watson *v.* Kirby & Sons, 112 Ala. 446, 20 South 624, interest on the value of the ginnery for that period would be the proper rule for the admeasurement of the damages. But such damages are not claimed. Nichols *v.* Basch, 138 Ala. 372, 376, 35 South. 409.

On the authority of Southern Railway Co. *v.* Webb, 143 Ala. 304, 315, 39 South. 262, 111 Am. St. Rep. 45, it must be held that expenses incurred by the plaintiff on the trip to Selma to look after the shipment are not recoverable damages.

We cannot find any thing in evidence upon which the claim for exemplary damages can be based. The defendant's agents at Selma, it seems, did not locate the car in which the pin was. This was all, and this cannot be said to be more than simple negligence. On the foregoing considerations, and on the proof made on the trial, charge 21, requested by the defendant, which restricts plaintiff's recovery to nominal damages should have been given.

For the errors pointed out, the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

CAMBLIN *v.* PHILADELPHIA, W. & B. R. CO.

(Supreme Court of Pennsylvania, April 29, 1907.)

[66 Atl. Rep. 977.]

Master and Servant—Negligence of Servant—Delegation of Powers.*—Plaintiff, while at work in a blacksmith shop, was injured by a car which broke through the side wall and entered the shop. The car was being moved from defendant's track by a side track to an abutting coalyard by mules under charge of an employee of the person who had contracted with defendant to move such cars to and from all private sidings. Held that, in leaving the cars on such siding, the defendant was exercising its charter power in the operation of its road which could not be delegated so as to relieve it from responsibility for the negligence of the contractor's employee or defective appliances.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert Cabblin against the Philadelphia, Wilmington & Baltimore Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, STEWART, and FELL, JJ.

Sharswood Brinton and *John Hampton Barnes,* for appellant. *Henry J. Scott,* for appellee.

FELL, J. The plaintiff, while at work in a blacksmith shop which adjoined a coalyard, was injured by a car which broke through the side of the wall and entered the shop. The car was loaded with coal and was being moved from the defendant's track on Washington avenue to a coalyard which abutted on the avenue by mules that were under the charge of an employee of C. H. Lafferty, who had contracted with the defendant to furnish teams and to move all cars on its tracks on the avenue, loaded or empty, and to and from all private sidings. He was directed to move the car by the defendant's dispatcher, and he testified that he was unable to stop it because of a defect in the brake.

The instruction to the jury was that the defendant was responsible if the accident was caused either by a defective brake or by the negligence of the contractor's employee who drove the mules. It is to the latter part of this instruction that exception is taken. That a railroad company cannot relieve itself from liability for negligence in the operation of its road by a contract

*See extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317.

for the movement of its cars was decided in P. W. & B. Railroad Co. *v.* Hahn, 22 Wkly. notes Cas. 32, in which it was said: "It contracted for the operation of a part of its road by horse power, and under this contract asks to be relieved from all responsibility for the negligent acts of its contractor. We cannot agree with a proposition of this kind, for the principle, if established, might be the means of relieving the company from all its charter duties, so far, at least, as concerns public saftey. The mere question of power by which its cars are to be moved is of no consequence. If it can contract for horse power, so may it for steam, and it follows that it might relieve itself of all responsibility by contracts with its engineers and conductors for the running of its locomotives and trains." In that case the cars at the time of the accidents were being moved by the contractor on the defendant's tracks on the avenue. In this case a car was being moved on a siding which extended from the tracks on the avenue to a coal-yard and was partly on private property. It is argued that the difference in the facts makes the decision in Railroad Co. *v.* Hahn inapplicable because the contractor was not performing any of the public duty of the defendant in putting the car on a private siding. This position cannot be sustained. The defendant undertook to deliver the coal to the assignee by moving its car on a siding which connected his yard with its tracks. This siding was its property and a part of its system of tracks to the edge of the street at least, and was maintained for the mutual advantage of itself and the owner of the yard. In moving cars on the siding it was exercising its charter power in the operation of its road, and this could not be delegated so as to relieve it of responsibility.

The judgment is affirmed.

FLOODY *v.* GREAT NORTHERN RY. CO. *et al.*

(Supreme Court of Minnesota, July 19, 1907.)

[112 N. W. Rep. 875.]

Railroads—Companies Using Roads of Others—Liability for Injuries.*—A railroad company is liable to its servants for the negligence of the employees of a union depot company, whose duty it is to operate the switches and direct the movement of the trains out of the depot yards. For the occasion, the servants of the depot company become the servants of the railroad company.

Same.—A switchman, who in the performance of his duty is required to ride on his engine while assisting in pulling a train out of the depot yards, is entitled to recover from his master, the railroad company, for injuries received by reason of the negligence of the depot company servants in operating a switch.

Same—Instructions—New Trial—Misconduct of Juror.—New trial granted upon the ground that certain instructions were misleading and for misconduct of a juror.

(Syllabus by the Court.)

*See Harrill *v.* South Carolina & G. E. R. Co. (N. Car.), 12 R. R. R. 725, 35 Am. & Eng. R. Cas., N. S., 725 (corporation operating railroad jointly with another is responsible for injury to its employees as a natural person would be for the liabilities of a firm of which he is a member); Louisville, etc., Ry. Co. *v.* Illinois Cent. R. Co. (Ky.), 22 R. R. R. 653, 45 Am. & Eng. R. Cas., N. S., 653 (flagman was employee of both railroad companies); Gulf, etc., Ry. Co. *v.* Shelton (Tex.), 8 R. R. R. 634, 31 Am. & Eng. R. Cas., N. S., 634 (existence of relation where switching crew worked for two companies); St. Louis, etc., Ry. Co. *v.* Smith (Ark.), 8 R. R. R. 1, 31 Am. & Eng. R. Cas., N. S., 1 (liability for wages where continuous line is operated by two companies of same name, but incorporated by different states); Newcomb *v.* New York Cent. & H. R. R. Co. (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10 (sleeping car porter was its employee so as to charge railroad with his negligence in directing passengers to jump from wrong train while it was moving); Wiest *v.* Coal Creek R. Co. (Wash.), 20 R. R. R. 398, 48 Am. & Eng. R. Cas., N. S., 398 (where employer lends his employee to third person for a particular employment, such employee, as to anything done in the particular employment, is the employee of the third person); Ederle *v.* Vicksburg, etc., R. Co. (La.), 11 R. R. R. 547, 34 Am. & Eng. R. Cas., N. S., 547 (where switching at intersection for two companies is done by employees of one of them, there is no privity of relation between the employees of one company and the other company); Missouri, K. & T. Ry. Co. *v.* Reasor (Tex.), 3 R. R. R. 281, 26 Am. & Eng. R. Cas., N. S., 281 (relation between company and one acting as express messenger, and also with its consent and approval, as its baggageman); Goodrich *v.* Kansas City, etc., R. Co. (Mo.), 19 Am. & Eng. R. Cas., N. S., 137 (sufficiency of evidence of employment where traffic arrangement between companies); foot-notes appended to Miller *v.* Northern Cent. Ry. Co.

Floody *v.* Great Northern Ry. Co

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Action by Thomas F. Floody against the Great Northern Railway Company and another. Verdict for plaintiff. From an order denying a new trial, defendant Chicago, St. Paul, Minneapolis & Omaha Railway Company appeals. Reversed, and new trial granted.

James B. Shecan (*Thomas Wilson,* of counsel), for appellant. *M. L. Countryman,* for respondent Great Northern Ry. Co. *Humphrey Barton,* for respondent Floody.

LEWIS, J. The complaint alleges that plaintiff was a switchman in the employ of defendant the Chicago, St. Paul, Minneapolis & Omaha Railway Company; that defendant the Great Northern Railway Company owned, maintained, and operated railroad tracks running into the Union Depot of the city of St. Paul, over which, by agreement, the Omaha Company operated its passenger trains into the Union Depot; that in connection with its tracks and as a part thereof the Great Northern maintained and operated a certain switch over which it operated its trains; that May 9, 1906, and for some time prior thereto, the Great Northern, for the use of itself and Omaha Company, in the operation of their trains, took charge of the switch for the purpose of operating the same; that while plaintiff was riding on a train of the Omaha Company the Great Northern Company carelessly and negligently failed to properly operate the switch, and the Omaha Company carelessly and negligently attempted to operate its train over the switch, and as result of the defective condition of the switch the train was derailed and the plaintiff injured. The Omaha Company admitted that it operated its trains into the Union Depot over the tracks of the Great Northern, pursuant to an agreement to that effect, and that the Great Northern Company owned and operated the switches and tracks. The Great Northern Company denied that it operated the switch, but admitted that it operated its trains into the Union Depot over the tracks in question. At the close of plaintiff's case defendants rested without introducing any evidence, and on motion the court directed a verdict for the Great Northern Company, at which time counsel for the Omaha Company stated to the court: "I also understand that, in sending this case to the jury, all consideration of the defective condition of that switch will be excluded." Counsel for plaintiff then moved the court to instruct the jury that the only question of fact for the jury to consider was the amount of damages that plaintiff was entitled to recover. The motion was overruled, whereupon the court charged the jury, and a verdict

(Pa.), 24 R. R. R. 481, 47 Am. & Eng. R. Cas., N. S., 481; Pittsburg, etc., Ry. Co. *v.* Bovard (Ill.), 22 R. R. R. 122, 45 Am. & Eng. R. Cas., N. S., 122.

was returned for plaintiff in the sum of $15,000, and the Omaha Company moved for judgment notwithstanding the verdict and for a new trial. The court denied the motion for judgment notwithstanding, but granted a new trial, unless plaintiff should consent to a reduction of the verdict to $10,000, to which plaintiff consented, and the Omaha Company appealed from the order.

It was shown at the trial that the Union Depot Company, a corporation, owned the Union Depot and certain yards and terminal facilities, with engines and railway tracks; that seven different railway companies used the terminal facilities and the depot under and by virtue of certain contracts entered into with that company; that the Union Depot Company had in its employ a crew of switchmen, whose business it was to take charge of incoming and outgoing trains, to operate the switches, and to give the proper signals. The two defendants in this action were entitled to use the depot and yard facilities; but the Great Northern Company owned a right of way of its own, and at the time of the accident had constructed and was maintaining two tracks thereon, both of which the Omaha Company had the use of for the purpose of running in and out of the depot. About April 20, 1906, the Great Northern Company took out an old switch and constructed a new one in its place—being the one where the accident occurred—connecting tracks Nos. 1 and 2, over which the passenger trains of the Great Northern Company and its lessee companies were diverted to and upon tracks 1 and 2 and over the new switch. The evidence shows that the old switch was operated exclusively by the Union Depot Company switchmen, and on the occasion of the accident, May 9th, and during the time from the 20th of April, the new switch continued to be operated by the employees of that company. Plaintiff was in the employ of the Omaha Company as a switchman, and it was his duty to ride down with his switch engine to the depot and assist in pulling the trains of that company out of the depot yards. The engine was in charge of an engineer and fireman, but in the exercise of his duties plaintiff was rightfully in the cabin of the engine. For some reason the switch in question was already open, or opened by the vibration of the approaching train, and as a result the engine was derailed and tipped over, and plaintiff was caught under it and injured.

At the trial it was shown by the testimony of several of the switchmen in the employ of the Union Depot Company that the switch in question was not easily operated, for the reason that one of the iron rods, or arms, was too long, and, when the arm was thrown from one side to the other, it did not go down far enough to permit the dog to catch and retain it, so that the operator had to bear his weight on the arm, or jump on it, in order to press it down into place. One witness also testified that the dog, or catch, did not always go into place and hold the arm securely.

So far as defendant the Great Northern Company is concerned, the court was correct in ordering judgment in its favor, provided the evidence did not show that it has been negligent in constructing and maintaining a defective switch. The trial court seemed to have the impression that the switch was not defective to such an extent as to render that company liable, but that the manner in which the switch was constructed simply required greater care on the part of the switchman in operating it to see that the arm was pressed down and caught by the automatic fastening. We are not at this time required to express any opinion as to this evidence; but, conceding that the Omaha Company cannot take advantage of the favor granted the Great Northern Company by the trial court in ordering judgment in its favor, the fact that the switch was imperfect (if it was) does not relieve the Omaha Company from the duty which it owed to plaintiff upon the occasion of his injury. As we understand the law, whether the engine was derailed by reason of the defective switch, or on account of the negligence of the switch tender in operating it, that company is liable for the result. It is not important whether the switch was operated by the employees of the Union Depot Company, as a part of their regular duties, or whether they operated this particular switch without the special authority of the Union Depot Company, and for the accommodation of defendant companies. We are satisfied that, as between the Omaha Company and the plaintiff, the company accepted the services of the switchman on that particular occasion to the same extent as though he had been in its own employ.

Conceding that, under the contract between the Union Depot Company and the Omaha Company, the latter was required to take its trains out of the depot over the switches in the manner directed by the switch tenders in the employ of the Union Depot Company, yet that fact did not discharge the railroad company from the contract relation which it assumed as between itself and plaintiff. The test of liability is not determined by the fact that the switch tenders were in the employ and under the control of the Union Depot Company, and that by virtue of the contract between the switchmen and that company the relation of respondeat superior existed. The Omaha Company owed the duty to plaintiff to use all reasonable diligence to carry him safely in its engine out of the depot yards, and it was immaterial to plaintiff whether in so doing defendant operated its trains over its own tracks and switches, over the tracks and switches which it had leased from another company, or under a contract with the Union Depot Company. It was immaterial to plaintiff that the switchmen were paid by the Union Depot Company, and were under its control in operating the switches, if, for the occasion, the Omaha Company chose to avail itself of the services of that company and its employees for the purpose of taking its train

out of the depot. The principle is well illustrated in the case of Wabash, St. Louis & Pacific Ry. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705, where the Wabash Company had leased from the Chicago & Western Indiana Railway Company the right to run its trains over a portion of the road of that company at a station at which several railroad companies ran, and from which their trains departed. The lessor company retained control of the Wabash Company's passenger trains over that portion of the track, and by its servants directed and controlled the trains in going in and out of the depot. The question was the liability of the Wabash Company for the acts of the servants of the lessor company in leaving lumber piled contiguous to the track, by reason of which the Wabash train caused injury to a stranger, the court held the Wabash Company voluntarily placed its engine and cars at that place, under the control and direction of the employees of the lessor company, and for the time being and for that purpose the yardmaster of the lessor company became the servant of the Wabash, and liability could not be escaped upon the ground that such yardmaster was under the control of the lessor. The case was referred to and approved in Murray *v.* Lehigh Valley Ry. Co., 32 L. R. A. 539, 66 Conn. 512, 34 Atl. 506, and the court said: "The case shows that, in the use of the portion of track owned by the Central Railroad Company, this defendant was bound by its agreement with that company to obey the orders and signals given by the servants of that company. The case shows, then, that to the extent of that agreement, and for the purposes included in it, this defendant had, by the terms of that agreement, made the servants of that company its own servants; and as the case further shows that the train on which the plaintiff was a passenger was upon this portion of track, and was being operated in obedience to the orders of those persons who by the agreement were the servants of this defendant, we think the charge was fully justified." See, also, Taylor *v.* Western Pacific R. R. Co., 45 Cal. 323; McElroy *v.* Nashua & Lowell R. Co., 4 Cush. (Mass.), 400, 50 Am. Dec. 794. And see the discussion in the opinion of Holmes, J., in Littlejohn *v.* Fitchburg R. Co., 2 L. R. A. 502, 148 Mass. 478, 20 N. E. 104.

Brady *v.* Chicago & G. W. Ry. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712, a similar case to the one under our consideration, was decided adversely to our views. There it was held that the switchmen were not the servants *pro hac vice* of the railway company, because they were not subject to its commands and directions, and the court distinguished the cases above cited upon the ground that the power to command, direct, and control the employees with respect to the negligent act was vested in the master of the servant injured. We perceive no difference in principle. In each case the relation between the parties was governed by contract, and for the benefit of the carrier charged with

negligence, and it is immaterial that the facilities were furnished by another carrier, rather than by an independent corporation, not a carrier in the general sense. Although the plaintiff's complaint did not directly charge that the Omaha Company had negligently operated the switch in question, but confined itself to an allegation that it negligently operated its train over a defective switch, yet no objection was made at the trial in this respect, and the case proceeded and was submitted to the jury upon the theory that, if the Omaha Company was liable at all, it was by reason of the negligent operation of the switch, and hence no error can be based upon the fact that the complaint was deficient.

The motion for a new trial was made in part upon the ground that one of the jurors while the trial was in progress visited the Union Depot Yards and personally examined the switch, observing its operation, as well as that of other switches in the yard, without the knowledge of any of the parties or of the trial court. Error was also assigned upon the ground that one of the jurors was under the influence of intoxicating liquor during the trial to such an extent as to interfere with his judgment. The court came to the conclusion that it was not satisfactorily shown that the juror was affected by the use of intoxicants, and also held that the visit of the juror to the yards did not prejudice defendant, for the reason that it was liable in any event, whether the accident was occasioned by reason of the defective switch or of negligence in its operation. On this subject the court stated to the jury that there was not sufficient evidence that the defective condition of the switch caused or contributed to the plaintiff's injury; but, even if there was not sufficient evidence to justify the jury in finding as a fact that the injury resulted from such defective switch, still, if they should find that the Omaha Company had notice of such defect as did exist, or could, by the exercise of ordinary care, have discovered it, then the jury should find for the plaintiff, even if they should find that the accident must have happened either from such defective condition of the switch or from the negligence of the tender. We believe that instruction was misleading. The jury were justified in assuming that, although there was no evidence to indicate that the switch was defective, yet they might take such defect as existed into consideration in determining whether the Omaha Company was guilty of negligence in operating it. While, as already stated, the Omaha Company was liable if the injury resulted from the defect in the switch, or from its negligent operation, yet whether the switch was negligently operated depended somewhat upon its construction. If defective, as claimed, it required a higher degree of care in operating it, and the condition of the switch became an essential element with the jury in considering the conduct of the switchman. The jury returned a verdict for plaintiff in the sum $15,000, which the trial court

considered excessive and reduced it by one-third. To what extent the verdict was influenced by the condition of the switch, as found by the juror who visited the yards, does not appear, but it will be presumed that the knowledge so obtained was prejudicial, and under such circumstances the error cannot be cured by a mere reduction of the verdict.

Although plaintiff took an appeal from the order of the court directing a verdict in favor of the Great Northern Company, the same was abandoned. The Omaha Company appealed from the order directing a verdict in favor of its codefendant, and submits that, if a new trial is granted upon any ground, it should be granted as to its codefendant. The Great Northen Company, however, insists that, plaintiff having abandoned his appeal as to itself, the Omaha Company has no standing to question the correctness of that order. The Great Northern Company was brought into the case as one of the defendants at the will of plaintiff, and not by any act of the Omaha Company. The record does not indicate that the former is under any obligation to the latter, and we find no reason to interfere with the direction of the court.

Reversed. New trial as to appellant, the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

TOLEDO, ST. L. & W. R. Co. *v.* LONG.

(Supreme Court of Indiana, Nov. 26, 1907.)

[82 N. E. Rep. 757.]

Constitutional Law—Class Legislation.*—Burns' Ann. St. 1901, §§ 7056, 7057, providing that every company, corporation, or association doing business in the state shall be required to pay its employees, engaged in manual or mechanical labor, at least once a month, and prescribing a penalty for noncompliance, is violative of the fourteenth amendment of the federal Constitution, as imposing on companies, corporations, and associations, burdens not imposed on individuals.

*See generally, foot-note appended to Lexington Grocery Co. *v.* Southern Ry. Co. (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349; foot-note appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420; foot-notes appended to Kane *v.* Erie R. Co. (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233; Bradford Construction Co. *v.* Heflin (Miss.), 24 R. R. R. 483, 47 Am. & Eng. R. Cas., N. S., 483; Pittsburg, etc., Ry. Co. *v.* Lightheiser (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130; McGuire *v.* Chicago, etc., R. Co. (Iowa), 21 R. R. R. 390, 44 Am. & Eng. R. Cas., N. S., 390.

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ather than by an independent corporation,
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was misleading. The jury were justi-
although there was no evidence to indi-
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held: provided, That said penalty shall in no instance exceed twice the amount due and withheld."

It will be observed that said sections, so far as they affect employers, only apply to "every company, corporation or association," and, so far as their employees are concerned, only apply to those "engaged in manual or mechanical labor for every company, corporation or association," but deny the right to such of their employees as are not "engaged in manual or mechanical labor." Employees of an individual, although engaged in manual or mechanical labor for such individual, are excluded from the benefit of said sections of the statute. They give the right to recover penalties and attorney's fees to a certain class of employees of companies, corporations, and associations, but deny such right to the same class of employees of an individual engaged in the same business under the same conditions. They impose new burdens on "every company, corporation and association" doing business in the state, while an individual engaged in like business under like circumstances and conditions is left without any such burden. This brings said sections within the rule declared in Bedford Quarries Co. *v.* Bough, 168 Ind. —, 80 N. E. 529, and the cases there cited, and upon the authority of said case we hold that they are unconstitutional.

Appellant urges that said sections are unconstitutional for other reasons, but as they are unconstitutional on the ground mentioned the same are not considered. As said sections do not put railroads in a class by themselves, as does the employer's liability act, we are not required to determine whether or not such a classification, if made, would render said sections valid as to railroads.

Other questions are argued; but, as they are either not properly presented in the brief or may not arise on another trial, they are not considered. It follows that the lower court erred in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

NEW YORK, C. & ST. L. R. CO. *v.* ROPP.

(Supreme Court of Ohio, June 25, 1907.)

[81 N. E. Rep. 748.]

Master and Servant—Injury to Servant—Compliance with Rules.*—A rule which requires car inspectors or car repairers, when at work under or about a car or train, to see for themselves that a blue flag by day or a blue light by night is displayed at each end of the car or cars upon which they are working, is a reasonable rule, providing for the safety of employees, and not limiting the master's liability for negligence; and an agreement with the master by the servant at the time of his employment that he understood such rule and would obey it is binding upon him.

Same.*—The failure to obey such rule is not executed by the presence or consent of another servant of the master, who is superior to the servant who agreed to obey such rule, when the superior servant is not authorized to represent the master in the making or changing of rules or contracts; and failure to obey the rule under such circumstances is negligence per se.

(Syllabus by the Court.)

Error to Circuit Court, Hancock County.

Action by one Ropp against the New York, Chicago & St. Louis Railroad Company. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Reversed, and judgment rendered for defendant.

The plaintiff below brought suit to recover damages for an injury which he received while in the employ of the railroad company, and while he was upon a cut of cars working as a car repairer, in consequence of the failure to display signals, as required by the rules. When the plaintiff entered into the employment of the defendant below, he was shown certain printed rules of the company and asked to read them, which he did. He was then asked if he understood them, and said that he did, and he then signed a paper which contained a statement and promise that he had read those rules and would obey them. The rules, which were admitted in evidence upon the trial, were as follows: No. 36: "A blue flag by day and a blue light by night,

*For the authorities in this series on the subject of the contributory negligence of railroad employees in violating their employer's rules and orders, see foot-notes appended to Maehren *v.* Great Northern Ry. Co. (Minn.), 21 R. R. R. 564, 45 Am. & Eng. R. Cas., N. S., 564; foot-notes appended to St. Louis, etc., Ry. Co. *v.* Caraway (Ark.), 22 R. R. R. 532, 45 Am. & Eng. R. Cas., N. S., 532; Pittsburg, etc., Ry. Co. *v.* Lightheiser (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130.

placed on the end of a car, denotes that car inspectors or car repairers are at work under or about the car or train. The car or train thus protected must not be coupled to or moved until the blue signal is removed by the car inspectors or car repairer." No. 377: "Car inspectors report to and receive their instructions from master mechanics. They are required to be fully conversant with the rules governing interchange of cars and inspect cars in accordance with same and with instructions issued by the superintendent of motive power; must be prepared to make any slight repairs that may be required; must be thoroughly familiar with the construction and manipulation of air brake and steam heat equipment and air signal. When inspecting and repairing cars that should not be moved, they must protect themselves by placing conspicuously a blue signal at both ends of the car, as provided in rule 36." No. 378: "Car repairers report to and receive their instructions from the foreman of the car repairers under the authority of the master mechanic. They are required in all cases, when doing work on or under cars which should not be moved, to see for themselves that a blue flag by day, or a blue light by night, is placed at each end of the car or cars upon which they are working."

The case was submitted to the jury substantially upon two propositions of law: First. Whether Whalen, who was a car inspector and repairer, and who had called the plaintiff to the work which he was doing and was directing him in regard thereto, was the superior of the plaintiff; and whether the plaintiff was actually under his direction and control and bound to obey him, either by the terms of his employment or by the exercise of such custom or authority as was usual in the conduct of that particular business in behalf of the railroad company. Second. If the jury should find that Whalen did have the power and authority of direction and control over the plaintiff at the time of the accident, and that Whalen designated the place where plaintiff was at work when he was injured, and that plaintiff proceeded to work under such circumstances and conditions as gave him to understand, in face of the rules requiring him to place a blue flag at either end of the cars, that such flags had been so placed by Whalen, and that it was because such flags had not been placed that the accident occurred, the verdict should be for the plaintiff. The defendant moved the court to arrest the testimony from the jury and direct a verdict for the defendant, and also requested the court to charge the jury that the court as a matter of law directs the jury to return a verdict in favor of the defendant railroad company, and also that it was the duty of the plaintiff himself under the rules to see that the blue flags were displayed while at work on this car, and that if he failed to so display them he could not recover. The court overruled the motion to direct a verdict and refused to give the

instructions requested. The verdict and judgment were for the plaintiff in the court of common pleas, and the judgment was affirmed by the circuit court. This proceeding in error is to reverse the judgment of both courts.

John H. Clarke and *Blackford & Blackford,* for plaintiff in error.

Franks & Franks and *McConica & Dwiggins,* for defendant in error.

DAVIS, J. (after stating the facts). We assume that Whalen was not a fellow servant with the plaintiff, and that the plaintiff was actually under the direction and control of Whalen in doing the work on which the plaintiff was engaged at the time he was injured, since the jury must have so found under the instructions of the court. It is a conceded fact, however, that the plaintiff entered into employment with the defendant under a written contract or statement to the effect that he had read and understood certain rules of the defendant relating to such employment and that he would obey them. One of those rules provided that car inspectors "are required to be fully conversant with the rules governing interchange of cars and inspect cars in accordance with the same and with instructions issued by the superintendent of motive power," and, "when inspecting and repairing cars that should not be moved, they must protect themselves by placing conspicuously a blue signal at both ends of the car, as provided in rule 36." Another rule requires that "car repairers report to and receive their instructions from the foreman of car repairers under the authority of the master mechanic," and "they are required in all cases, when doing work on or under the cars which should not be moved, to see for themselves that a blue flag by day, or a blue light by night, is placed at each end of the car upon which they are working." Rule 36, which has been referred to, reads as follows: "A blue flag by day and a blue light by night, placed on the end of a car, denotes that car inspectors or car repairers are at work under or about the car or train. The car or train thus protected must not be coupled to or moved, until the blue signal is moved by the car inspectors or car repairers." It is a humane requirement of the law that railroad companies shall make such reasonable rules and regulations as will tend to minimize accidents in the conduct of their hazardous business. The rules in question not only put it in the power of car inspectors or car repairers to absolutely safeguard themselves when at work under or about a car or train of cars; but it is made the imperative duty of engineers and trainmen to respect the signals. The car or train which carries a blue signal is "protected," and "it must not be coupled to or moved." The rules are therefore fair and reasonable, and, indeed, they impose on the railroad operatives no more than ordinary care

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John H. Clarke and *Blackford & Blackford,* for plaintiff in error.

Franks & Franks and *McConica & Dwiggins,* for defendant in error.

DAVIS, J. (after stating the facts). We assume that Whalen was not a fellow servant with the plaintiff, and that the plaintiff was actually under the direction and control of Whalen in doing the work on which the plaintiff was engaged at the time he was injured, since the jury must have so found under the instructions of the court. It is a conceded fact, however, that the plaintiff entered into employment with the defendant under a written contract or statement to the effect that he had read and understood certain rules of the defendant relating to such employment and that he would obey them. One of those rules provided that car inspectors "are required to be fully conversant with the rules governing interchange of cars and inspect cars in accordance with the same and with instructions issued by the superintendent of motive power," and, "when inspecting and repairing cars that should not be moved, they must protect themselves by placing conspicuously a blue signal at both ends of the car, as provided in rule 36." Another rule requires that "car repairers report to and receive their instructions from the foreman of car repairers under the authority of the master mechanic," and "they are required in all cases, when doing work on or under the cars which should not be moved, to see for themselves that a blue flag by day, or a blue light by night, is placed at each end of the car upon which they are working." Rule 36, which has been referred to, reads as follows: "A blue flag by day and a blue light by night, placed on the end of a car, denotes that car inspectors or car repairers are at work under or about the car or train. The car or train thus protected must not be coupled to or moved, until the blue signal is moved by the car inspectors or car repairers." It is a humane requirement of the law that railroad companies shall make such reasonable rules and regulations as will tend to minimize accidents in the conduct of their hazardous business. The rules in question not only put it in the power of car inspectors or car repairers to absolutely safeguard themselves when at work under or about a car or train of cars; but it is made the imperative duty of engineers and trainmen to respect the signals. The car or train which carries a blue signal is "protected," and "it must not be coupled to or moved." The rules are therefore fair and reasonable, and, indeed, they impose on the railroad operatives no more than ordinary care

in the preservation of life and the prevention of injuries.

The stipulation in the contract of employment that the plaintiff would obey these rules and "see for himself" that the signals required for his protection were displayed is not void as against public policy, because it does not exempt the railroad company from liability, or limit its liability, for the consequences of its own negligence. Pennsylvania Co. *v.* Shearer, 75 Ohio St. 249, 79 N. E. 431. It is no more and no less than what it purports to be—a reasonable condition in the contract of employment that the employee will faithfully observe the rules which are essential to his own safety. The plaintiff in this case admits that, with full knowledge of the purport of the rules, he signed a written promise to obey the rules, which required him "in all cases," when at work on or under a car which should not be moved, "to see for himself" that the proper signals were "conspicuously" displayed. He admits that at the time he was hurt he and Whalen did not "see for themselves" that the signals were placed as required by the rules, and that in consequence of that omission, although the contractual obligation may have been on both of them and upon one as much as the other, he was injured. But he claims, and the jury was so instructed by the court, that because of the presence of a superior, Whalen, whose duty to likewise observe the rules is undisputed, and because Whalen had directed the plaintiff where to work and what to do, the plaintiff is entitled to recover, if he "proceeded to do the work under such conditions and circumstances as gave him to understand, and the right to understand, in face of the rules requiring him to place a blue flag at either end of the cars, that such flags had been so placed by Whalen." In other words, although he had not been told by Whalen to disregard the rule, and although he had not looked to see if the signals were placed, and nothing had been said on the subject, he had the right, when called by Whalen to come and help him on the repairs on which Whalen was working, to take it for granted that Whalen had done his duty, or to infer from Whalen's conduct and surrounding circumstances that the rule was suspended for the time being.

This theory of the case does not seem to us to be tenable. For aught that appears, the rules were equally obligatory on both Whalen and the plaintiff. They certainly were binding on the plaintiff, and the violation of the rules by Whalen, whether he were a superior or not, could not release the plaintiff from his contractual obligation, which was made for the benefit of both himself and his employer. Nor could Whalen either expressly or impliedly suspend the operation of any rule for a single moment. It does not appear in the record, and is not to be presumed, that he had any authority from the company to make contracts or enact rules for it; and, if he had no authority to make them, he had no authority to break them, or to disregard,

abrogate, suspend, or repeal them. Neither can such authority be implied from the fact that Whalen had authority to direct and control the plaintiff in the performance of his duties as a car repairer. His authority to control and direct was authority to control and direct within the limitations of the rules prescribed by the company for the government of all employees. The rules required that car inspectors should "be fully conversant * * * with instructions issued by the superintendent of motive power," and that, "when inspecting and repairing cars that should not be moved, they must protect themselves by placing conspicuously a blue signal, * * * as provided in rule 36." Both Whalen and the plaintiff, therefore, must have known that rule 378 made it imperative to put out the signals "in all cases when doing work on or under cars which should not be moved." There is no room here for misunderstanding or implication. The rule is to apply in all cases, and therefore neither had Whalen the right to waive the rule in any case, nor had the plaintiff any right to infer a waiver of it in any case. There is not even room for an argument from the necessity of the case; for the plaintiff could have obeyed the order of his superior, and still have protected himself from injury by obeying the rule. He chose rather to take the chances in the performance of a little task, which probably would take less time than would be consumed in putting the blue flags at each end of the cut of cars. It was a plain assumption of the risk by the plaintiff, in the sense of taking the chances, a risk which he had expressly agreed with his employer that he would not take. Richmond & Danville Railroad Co. *v.* Finley, 63 Fed. 228, 231, 12 S. C. A. 595. It was said by Brewer, J., in Atchison, T. & S. F. R. Co. *v.* Reesman, 60 Fed. 370, 378, 9 C. C. A. 20, 28, 23 L. R. A. 768, that "the question is not one of obedience to orders, but of a compliance with rules; and, generally speaking, the duty of compliance is not waived by the mere fact that some controlling official has knowledge of the failure to comply"

A different result might be reached if there were a habitual violation of the rule, with knowledge thereof and acquiescence therein by such officers of the company as are authorized to act in its behalf of making and changing of rules; but such a state of facts is expressly disclaimed in this case. The views which we have here expressed are strongly supported in York, Adm'r *v.* C., M. & St. P. Ry. Co., 98 Iowa, 544, 67 N. W. 574, in which an engineer disobeyed a rule in obeying the conductor's signal to start the train and was injured: in Richmond & Danville Railroad Co. *v.* Rush, 71 Miss. 987, 15 South. 133, in which a brakeman was injured through breach of a rule while obeying an order of the conductor; in a similar case in Russell *v.* Richmond & Danville Railroad Co. (C. C.) 47 Fed. 204; in Atchison, T. & S. F. R. Co. *v.* Reesman, 60 Fed. 370, involving the violation of

a rule with knowledge and assent of the conductor; in Richmond & Danville Railroad Co. *v.* Finley, 63 Fed. 228, 12 C. C. A. 595, where there was a violation of a rule in obedience to order of engineer or conductor; and in Alabama Great Southern R. R. Co. *v.* Roach, 110 Ala. 266, 20 South. 132. The defendant in error invokes the authority of Van Duzen Gas & Gasoline Engine Co. *v.* Schelies, 61 Ohio St. 298, 55 N. E. 998. We do not regard that case as controlling upon the facts here presented. Cincinnati Gas & Electric Co. *v.* Johnston, 76 Ohio St. 119, 81 N. E. 155.

The court of common pleas erred in refusing to direct a verdict for the defendant on the undisputed facts, and the circuit court erred in affirming the judgment of the court of common pleas. The judgments of both courts are reversed, and judgment rendered for plaintiff in error.

SHAUCK, C. J., and CREW and SPEAR, JJ., concur.

MOIT *v.* ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit, May 10, 1907.)

[153 Fed. Rep. 354.]

Master and Servant—Action for Injury of Servant—Evidence of Master's Negligence.*—Where plaintiff, a car repairer employed by defendant railroad company, was injured while repairing the trucks which had been removed from under the end of a car by the falling of the end of the car which had been jacked up by other employees, and rested upon the jacks, there was no presumption of negligence on the part of defendant arising from the accident itself, and no ground of recovery against it for the injury was shown, in the absence of any substantive proof of its negligence or of any evidence to show what caused the car to fall.

Same—Unsafe Place to Work—Negligence of Fellow Servants.—The jacking up of the end of a railroad car for the purpose of repairing the trucks was not a part of the master's duty of providing a

*For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see foot-notes appended to Stewart *v.* Raleigh, etc., R. Co. (N. Car.), 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to Norfolk & W. Ry. Co. *v.* McDonald's Adm'x (Va.), 22 R. R. R. 101, 45 Am. & Eng. R. Cas., N. S., 101; foot-notes appended to Vissman *v.* Southern Ry. Co. (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; St. Louis, etc., R. Co. *v.* Hill (Ark.), 20 R. R. R. 21, 44 Am. & Eng. R. Cas., N. S., 20.

reasonably safe place for the employees to work, but a part of the duty of the servants making the repairs, and there can be no recovery against the master for an injury resulting to a fellow servant from their negligence in doing the work, the appliances furnished by the master not being shown to have been insufficient nor defective.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Jere Horne, for plaintiff in error.
A. W. Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for personal injury. The plaintiff below was a car repairer. He was at work under the trucks removed from one end of a jacked-up box car. While thus engaged, the end of the car fell upon his legs, which extended beyond the trucks. The court below directed a verdict for the railroad company on the ground that there was no proof that its negligence caused the injury.

The evidence below was limited to the plaintiff, George W. Moit, at the time of the accident employed as a car repairer in the shops of the Illinois Central Railroad Company, at Memphis, Tenn., and an employee who worked along with him, his so-called "partner," John K. Brigance. On February 18, 1905, Moit was ordered by his foreman to assist Brigance in placing a bolster on the trucks of a car then in the yard. When Moit and Brigance reached the car, they found one end of it jacked up and the trucks removed. These trucks were still partly underneath the jacked-up end. It was necessary for Moit and Brigance, in order to do their work, to remove the nuts from certain bolts connected with the trucks. These bolts held the bolster on. Moit found that the nuts could not be removed with a wrench; they had rusted, and the bolts would turn with the nuts. As a result, it became necessary to cut the nuts off, and Moit was under the trucks holding an iron maul against a nut while Brigance cut it off with a cold chisel, when the accident occurred. While Moit and Brigance were thus at work, Moit's legs extending to a point beneath the end of the car, the jacks gave way, and the end of the car fell. It struck the trucks, rolled them away, and fell upon Moit's legs, injuring them so severely that one had to be amputated, and the other was so crippled as to become almost useless.

The car was an ordinary freight or box car. It was jacked up in the customary way for an empty car. There was testimony tending to show that a loaded car, when jacked up, was ordinarily supported by trestles. As to whether this car was loaded or not, Moit was without knowledge. The door of the car on

his side, as he passed it going to his work under the trucks, was fastened. Brigance testified that "the car was loaded with shavings, sawdust, trash, out of the shed." But Brigance did not discover this until after the accident, and the testimony he thus gives is far from satisfactory upon the point that the car was "loaded" in the common acceptation of the term, and needed to be supported by trestles when jacked-up. Indeed, there is no proof whatever upon the latter point.

The only explanation given, or offered, of the cause of the accident, was by Brigance, who, when asked what caused the car to fall, said:

"I could not tell, without the ground was froze and kinder thawing that evening, and the jacks slipped. The car slued and caused it to fall, I think."

This is mere conjecture on the part of Brigance, for he says his back was turned to the car when it fell. There is no other testimony on this point; nothing tending to show that the jacks were defective, or that they gave way, or the car slued because of any fault on the part of the company.

1. Plaintiff's case was based upon the alleged duty of the railroad company to provide the plaintiff with a reasonably safe place in which to work and reasonably safe appliances with which to work. It contended that the car fell, either because the jacks were defective or were used in an improper and inefficient way; and it insisted that under the doctrine of *res ipsa loquitur* the fact of the accident itself made a *prima facie* case of negligence which the court should have submitted to the jruy.

In the recent cases of Illinois Central R. R. *v.* Coughlin, 132 Fed. 801, 65 C. C. A. 101, Cincinnati, etc., R. R. Co. *v.* South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, and Carnegie Steel Co. *v.* Albert Byers (C. C. A.) 149 Fed. 667, we have had occasion to apply the rule laid down by the Supreme Court in Texas & Pacific R. R. Co. *v.* Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and Patton & Pacific R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, wherein it was pointed out that what might make a *prima facie* case of negligence against a railroad company in favor of a passenger or a stranger would not apply as between the company and its employee. In the latter case there was no presumption of negligence arising from the accident itself, but the liability of the company to its employees must be made out by proof that the company was negligent, and this negligence brought about the resulting injury. If the testimony left the matter uncertain, indicating only that one of a number of things may have brought about the injury, for some of which the company was responsible, and for others not, it was not for the jury to guess between these numerous causes and find that the negligence of the company was the real cause, when there was no satisfactory founda-

tion in the testimony for that conclusion. 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361. Thus, in the case of Carnegie Steel Co. *v.* Albert Byers, where a hydraulic jack used to elevate cars of molten metal, on which an electric locomotive partly stood, suddenly and unexpectedly, and without any apparent cause, arose from its position, tipping the locomotive up and injuring an employee of the company who was upon it, we held that the mere fact that the elevator or jack arose without any apparent cause was not sufficient to make *a prima facie* case of negligence against the company. "The burden, however, was upon the plaintiff to make substantive proof of some negligence—the omission of some duty which the defendant owed to him. It was incumbent upon him to show either that the jack was an improper appliance, or that the company had been negligent in keeping it in reasonably safe repair. Looney *v.* Metropolitan R. R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Ill. Cen. R. R. Co. *v.* Coughlin, 132 Fed. 801, 803, 65 C. C. A. 101; Texas & Pacific R. R. Co. *v.* Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. There was no substantial evidence from which the jury might reasonably find that this accident was due to negligence. Its cause is wrapped in doubt and uncertainty. It may have happened from some cause for which the defendant was not liable or from actionable negligence. It was the duty of the plaintiff to make a case from which a jury might reasonably find negligence. This it did not do." 149 Fed. 673.

In the present case, there was no proof that the jacks were not reasonably safe appliances for the work for which they were designed. Nor was there any proof that they had been improperly used in jacking up the end of the car. We have referred to the proof respecting the loading of the car. The testimony of Brigance was not in our opinion sufficient to warrant the conclusion that the car was "loaded," in the sense that it required trestles to support the end which was jacked up. If it be urged that the car fell, and that is proof enough that either the jacks were defective or they were improperly used, it may be pointed out that any outside force which jarred the car and caused its lifted end to slue might have caused the jacks to give way. The chance of this happening was one taken by the car repairers. Indeed, the witness Brigance suggests an intervening cause which was purely external, namely, the thawing of the ground on which the jacks rested. Obviously, the unequal sinking of the jacks through thawing might disturb the equilibrium of the end of the car and cause it to slue and fall. Other illustrations might be given of the fact that the car might fall without any negligence on the part of the railroad company; but such negligence is essential, and must be supported by substantive proof in order to justify the submission of the case to the jury. Looney *v.* Metropolitan R. R. Co., 200 U. S. 480, 486, 488, 26 Sup. Ct. 303, 50 L. Ed. 564.

2. It is vigorously urged that in jacking up the end of the car the railroad company was providing a place for Moit to work, that whoever assisted in jacking up the car was doing the master's work, and, since the accident resulted from a failure to do this work, the company should be held responsible. This contention does not appeal to us. The jacking up of the end of the car for the purpose of removing the trucks and replacing a bolster was not a part of the master's duty of providing a reasonably safe place in which to work, but a part of the servants' duty of repairing the car. Wabash R. R. Co. *v.* Propst, 92 Ill. App. 485. That duty was intrusted to a number of employees, including the plaintiff, Moit. It is true the car was jacked up and the trucks removed before Moit reached the ground. This work was done by his fellow servants. If they, or any of them, were negligent in doing it, it was the risk he assumed by reason of his employment. Of course, the rule of fellow servant does not apply to the condition of the jacks that were furnished by the railroad company for the purpose of lifting up the end of the car. That appliance had to be a reasonably safe one, and, if there were proof that the accident resulted from the negligent furnishing of insufficient or defective jacks, the railroad company would be responsible; but there is no such proof.

The judgment is affirmed.

LAMB *v.* PHILADELPHIA & R. RY. CO.

[66 Atl. Rep. 762.]

Master and Servant—Injury to Servant—Evidence.*—In an action by an employee to recover for injuries sustained by the giving way of a portion of the roof of a roundhouse wherein he was working, it is error to refuse to permit him to show that for two years prior to the accident he had never seen any one inspecting or repairing the roof, and that during the month before the accident he saw parts of the roof frequently fall to the floor of the roundhouse.

Evidence—Similar Facts—Admissibility.*—In an action for injuries caused by a fall of a portion of roof of roundhouse, plaintiff could show the bad condition of other portions of the roof similarly situated.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank J. Lamb, by his mother and next friend,

*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275; Vicksburg Ry. & Light Co. *v.* Miles (Miss.), 22 R. R. R. 94, 45 Am. & Eng. R. Cas., N. S., 94.

Eleanor A. Gordon, against the Philadelphia & Reading Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Russell Duane, for appellant.
Gavin W. Hart, for appellee.

ELKIN, J. The appellant, Lamb, a boy 18 years of age, while in the employ of the defendant company, was ordered by its foreman to clean the skylights which made the roof of a certain roundhouse belonging to the appellee. According to his testimony he was standing on a skylight, cleaning it with a mop, when one of the sashes suddenly gave way, and he fell to the floor below, sustaining severe injuries for which damages are claimed in this action. The negligence complained of is that appellee had negligently and carelessly permitted the skylights to fall into such a condition of nonrepair and to become so weakened and defective as to make them an unsafe place on which to work. The roof of the roundhouse was cone shaped and almost entirely covered with skylights, each skylight being between five and six feet long and three feet wide, and supported and kept in place by strips of metal an inch and a half wide and extending the length of a skylight. Testimony was introduced in the court below tending to show that the smoke or soot emitted by the locomotives which passed in and out of the roundhouse had caused these metal strips or frames to rot or corrode, and as a result thereof the roof was in a condition of decay and nonrepair; that pieces of glass and metal strips were constantly falling down from the skylights, and that prior to the date of the accident there had been no inspection of the skylights or repair of the defective conditions. At the trial a compulsory nonsuit was entered on the ground that there was no evidence to show what caused the accident. The ruling of the learned trial judge in this respect, and also his refusal to admit the testimony on behalf of the plaintiff relating to the failure of the defendant to make proper inspection or repair, and also as to the general bad condition of the roof, have been assigned for error.

The third and fourth specifications of error relate to the refusal of the trial judge to admit the testimony of the plaintiff tending to show that prior to the accident the roof of the roundhouse had not been inspected or repaired by the defendant company. The appellant was not permitted to testify that during the time of his employment at the roundhouse for a period of almost two years, with many opportunities to observe the skylights, he had never seen anyone inspecting or repairing them. This testimony should have been admitted, and it was error to

exclude it. It was proper to show these facts, which, taken in connection with other evidence in the case, should be considered by the jury in determining the question whether proper inspection had been made and a reasonably safe place provided.

The ninth specification of error relates to the action of the trial judge in striking out all the testimony of the witness Daily with regard to the condition of the roof: The substance of Daily's testimony is that during the month preceding the accident he saw pieces of glass from the skylight and of metal strips which supported the same frequently falling to the floor of the roundhouse. He also saw pieces of these metal strips protruding downward from the skylights. The testimony was introduced for the purpose of showing the bad condition of the roof. It was stricken out apparently on the ground, as stated by counsel for defendant company in making the motion, that it was introduced upon the assurance of counsel for plaintiff that expert testimony would be introducted to show that the condition Mr. Daily found was caused by something which the expert would testify about. The expert, Link, previously called by the plaintiff, did testify as to the cause of the bad condition of the roof, and what produced it, and we can see no sufficient reason why the testimony of Daily should have been striken out. This testimony, showing the defective condition of the skylight in conjunction with that of the expert Link showing what caused the condition, was clearly admissible. Even though the expert's testimony had not been introduced to show what caused the roof to fall into a state of decay and nonrepair, the testimony of Daily as to the general bad condition of the roof was admissible. Nor do we agree under the facts of this case that it was necessary to show the condition of the next exact spot where the injury occurred, but it was proper to prove the bad condition of other portions of the roof similarly situated and affected as that in the immediate vicinity of the accident. This would come clearly within the rule stated in 21 Am. & Eng. Ency. of Law (2d Ed.) 518, wherein it is said: "Where also, from evidence of the condition or quality of other portions of the structure or premises than that immediately causing the injuries, it is reasonable to infer the condition or quality of the portion directly involved, at the precise point or place where the injuries occurred, such evidence is proper for the consideration of the jury."

Under all the circumstances of this case, it was for the jury to say whether there had been sufficient inspection, and whether the roof was a reasonably safe place on which to work.

The first, third, fourth, and ninth assignments of error are sustained.

Judgment reversed and a venire facias de novo awarded.

FINLEY *v.* LOUISVILLE RY. CO.

(Court of Appeals of Kentucky, June 26, 1907.)

[103 S. W. Rep. 343.]

Master and Servant—Injury to Servant—Action—Evidence—Similar Facts—Other Injuries from Same Cause.*—In an action against a street railway company for injuries caused to a conductor by coming in contact with a pole at the side of the track, it was error to exclude evidence of a former conductor that his attention had been called to the proximity of the poles to the track by reason of his clothing coming in contact with one of them, and that another conductor had been hit by a pole at the same place at which plaintiff was struck while collecting fares on the running board, since it was competent to show that the poles were too near the track to be safe for the conductor in using the running board in collecting fares.

Same—Duty to Provide Safe Place to Work.†—It was the duty of a street car company to furnish its employee with a reasonably safe place to work, and he is not precluded from recovering for an injury caused by a pole in dangerous proximity to the track, unless he had notice of it or it was patent to persons of his experience and understanding.

Same—Duty of Servant to Inspect.‡—Where it is not in the line of a servant's duty, he is not required to make an inspection of his place of work to discover the defects and dangers incident thereto.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by Grace A. Finley against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Chas. J. Carroll and *P. J. Beard,* for appellant.

Fairleigh, Strauss & Fairleigh and *Greene & Van Winkle,* for appellee.

*See foot-notes appended to Mobile Light & R. Co. *v.* Walsh (Ala.), 24 R. R. R. 114, 47 Am. & Eng. R. Cas., N. S., 114; foot-notes appended to Stone *v.* Union Pac. R. Co. (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

†See foot-notes appended to Southern Ry. Co. *v.* Carr (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

‡See foot-notes appended to O'Brien *v.* St. Paul City Ry. Co. (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323; Indianapolis St. Ry. Co. *v.* Kane (Ind.), 23 R. R. R. 151, 46 Am. & Eng. R. Cas., N. S., 151; foot-note appended to Floan *v.* Chicago, etc., Ry. Co. (Minn.), 23 R. R. R. 95, 46 Am. & Eng. R. Cas., N. S., 95.

Finley *v.* Louisville Ry. Co

NUNN, J. This appeal is from a judgment upon a verdict of a jury finding for appellee. Appellant instituted this action against appellee, setting up the facts that he was conductor on one of appellee's cars on the 6th day of August, 1905, and that while operating the car on Seventh Street and Park line, while in the discharge of his duties as conductor, standing on the running board of the car and attending to the collection of fares from passengers, he came into collision with a pole which appellee had erected near its track, and was knocked off the car, rendered unconscious, and was seriously and permanently injured. Appellee filed an answer, denying the allegations of the petition, and pleaded contributory negligence on the part of appellant. The evidence shows that appellant had been in the employment of appellee company from March, 1905, until the time of the injury; that about the 19th of July, 1905, up to the 6th of August of that year, he had been running on the Seventh Street and Park line road. This road leads from Louisville to Jacobs Park, which is situated outside of the city limits. The car he was upon is what is known as an "excursion car." These cars are about 42 or 43 feet in length. On each side of the car is a running board, about 11 inches wide. The body of the car extends over the rail about 14 inches, and the running board, which is attached to the body of the car, extends over the rail about 24 inches. Upon this running board the conductor stands or walks while collecting fares. The accident occurred about 10:30 o'clock in the night, as the car was running from Jacobs Park to the city of Louisville. It had been raining during the night, but whether it was raining at the time of the accident does not clearly appear. The testimony shows that the car was loaded to its full capacity; every seat being taken and several passengers standing on the running board. The testimony also shows that the inspector of appellee was present at the loading of this car and that he superintended the loading, that he is the overseer, or boss, of the conductor, and that the conductor is required to obey his orders. When the car had left Jacobs Park, coming towards the city, and run about eight or ten minutes at full current, appellant was struck by the pole of the company, and knocked from the running board of the car. This occurred after the car had passed the crossing known as "Rogers Crossing." The pole he came in contact with was one of the poles used by the company for supporting the trolly wire. At the time of the injury he was standing on the running board of the car, collecting fares, and some person or persons, passengers, were moving down the running board. He caught hold of the brass handholds on the side of the car and leaned back for the purpose of permitting those on the running board to pass between him and the car, and in so doing struck the pole. It is not shown by the testimony what pole he struck. The persons who picked him up did not testify. Two witnesses on a

side testified, who stated they had measured the distance from the rails of 10 poles beyond the Rogers Crossing. The two who testified for appellant gave the distance of the poles from the car at a height of 8 feet from the rail, the nearest pole being 13 inches from the car, and the others ranging from that to 25 inches. They gave as a reason for fixing this point for measurement was that this running board was 2 feet above the rail and appellant was 6 feet, in height. Two witnesses for appellee stated that the measurement they made showed the poles, at a distance of 6 feet above the rail, ranged from 24 inches to 30 inches. The poles on the opposite side of the tract were a much greater distance from the rails. Appellant asked a reversal upon two grounds: First. The court erred in rejecting evidence offered by him. Second. The court erred in the instructions to the jury.

Appellant offered as a witness one C. W. Boswell, an old conductor who had frequently run on this line, who would have testified, according to the avowal, that he had frequently traveled over this line; that his attention had been called to the proximity of the poles to the track by reason of his clothing coming in contact with one of them, and would have testified further, shown by the avowal, that another conductor, while passing the point where appellant was struck, was hit by a pole while he was on the running board collecting fares. In our opinion this testimony was competent for the purpose of showing that the poles were too near the track to be safe for the conductor in using the running board while collecting fares. According to the testimony introduced, there was a sharp conflict as to the distance of the poles from the track, and this testimony would have tended to support the theory of appellant.

In our opinion the following, incorporated in instructions 1 and 2, was error, prejudicial to the substantial rights of appellant. From No. 1 the following should have been omitted, to wit: "And you shall further believe from the evidence that the defendant, or its agents or employees superior in authority to plaintiff, knew, or could by the exercise of ordinary care have known, that the said pole was too close to the track to be reasonably safe for its conductors in the discharge of their duties, and shall further believe from the evidence that the plaintiff did not know, and could not have known by the exercise of ordinary care, that the said pole was too close to the track"—and from No. 2 the following: "If you shall believe from the evidence that the defendant, or its officers and agents superior in authority to the plaintiff, did not know, and could not have known by the exercise of ordinary care, that the pole with which the plaintiff alleges he came in contact was so near the track as to be not reasonably safe to the plaintiff in the discharge of his duty, then the law is for the defendant, and you should so find. Or, if you shall believe from the evidence that the plaintiff knew, or could have known

by the exercise of ordinary care, that the said pole was too near the track to be reasonably safe in the discharge of his duties, then the law is for the defendant, and you should so find." The law requires the master to furnish his servant a reasonably safe place in which to perform his labor. The proof shows that appellee erected these poles in the positions they occupied at the time appellee was injured. If by reason of their positions it was unsafe for its employees to perform their labor on the running board of the car, appellee must be presumed to have known it. Therefore, requiring the jury to believe that appellee knew, or could, by the exercise of ordinary care, have known, that the poles were too near the track to be safe for its employees to perform their labor, was error. The principle announced in the instructions would be correct if these poles, without the knowledge of appellee, had been changed or interfered with, thereby making them dangerous to the employees. Then it would have been proper for the court to have told the jury that, before they could find for appellant, they must believe from the evidence that appellee knew or by the exercise of ordinary care could have known of the dangerous situation in time to have remedied the matter. It was also error for the court to tell the jury that they must find against appellant if they believed from the evidence that he could have known by the exercise of ordinary care that the pole was too near the track to be reasonably safe in the discharge of his duties. This should have been omitted from the instructions. It appears from the evidence in this case that an examination and inspection of the poles was not in the line of appellant's employment. He had nothing to do with reference thereto.

In the case of Derby's Adm'r *v.* Kentucky Central Railroad Co., 4 S. W. 303, 9 Ky. Law Rep. 153, the court said: "In the case of Houston, etc., Ry. Co. *v.* Oram, 49 Tex. 341, it was said: 'It is the duty of the railroad company to use ordinary care to provide such cars, roadbed, tanks, etc., as are reasonably safe; that a failure to do this is negligence chargeable on the company itself, and that the company is responsible in damages to an employee for an injury resulting, without his negligence, from a tank or other appendage of the road so negligently constructed as to subject the employee to unnecessary or extraordinary danger, which he could not reasonably anticipate or know of, and of which he, in fact, was not informed.' We think the rule is that railroad companies are not bound to furnish appliances absolutely safe, but that they must use reasonable care to provide such as are reasonably adequate and safe for the use of their employees. The latter, in accepting the employment, assumes all the ordinary risks of the business; but, if engaged in operating the trains, they cannot well know, and it is not a part of their business to ascertain, the condition of the appliances in use, unless they are immediately under their care and subject to their control. They

do not contract with reference to them. Thus, a brakeman has a right to rely upon the company using reasonable care in providing a safe track. He has no opportunity to inspect it. It is not a part of his business, and unless he, in fact, knows of its defective condition, and recklessly exposes himself to the danger, he is not chargeable with neglect. The master cannot place an additional or extra risk upon the servant without notice to him." In the case of Cincinnati, etc., R. Co. *v.* Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12, this court quoted with approval the following from Beach on Contributory Negligence, to wit: "If the roof or overhead structure of the bridge is so low that it will strike a brakeman standing erect on the top of the train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporation in building or maintaining these man traps." And in the same case it again quoted with approval an extract from the opinion in the case of Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381, which is as follows: "When a railroad company constructs a covered bridge along the line of its road, it should be built of sufficient height so that persons employed by the railroad company as brakemen, and who are required to go on top of the freight cars discharging their duties as brakemen, while going through the bridge, may pass through or under it without danger to their personal safety, and the law does not require of a brakeman that he should absolutely know all the defects of construction, and all the obstructions that may be along the line of the road."

These cases are applicable to the case at bar. We are unable to perceive any difference in the principles governing the liability of the master for injuries to a servant caused by an obstruction overhead and one caused by an obstruction at the side, or any other place. See, also, cases of Martin's Adm'r *v.* L. & N. R. R. Co., 95 Ky. 616, 26 S. W. 801; L. & N. R. R. Co. *v.* Cooley's Adm'r, 49 S. W. 339, 20 Ky. Law Rep. 1372; L. & N. R. R. Co. *v.* Tuckers' Adm'r, 65 S. W. 453, 23 Ky. Law Rep. 1929; Pfisterer *v.* Peter & Co., 78 S. W. 450, 117 Ky. 501; Geo. Weidemann Brewing Company *v.* Wood, 87 S. W. 772, 27 Ky. Law Rep. 1012; Corley *v.* Paducah Cooperage Co., 89 S. W. 512, 28 Ky. Law Rep. 451; Mergenthaler-Horton Basket Co. *v.* Taylor, 90 S. W. 968, 28 Ky. Law Rep. 923; Central Coal & Iron Company *v.* Walker, 99 S. W. 309, 30 Ky. Law Rep. 621; O. B. Ingram *v.* Covington, Flemingsburg & Ashland Railway Co., 99 S. W. 666, 30 Ky. Law Rep. 713. In the case last named this court said: "In the case at bar it appears from the evidence in behalf of appellant that he was one of several carpenters serving appellee in a subordinate capacity. Another was foreman of the hands and superintendent of the work. The scaffold had been

constructed by the other carpenters by direction and supervision of the foreman the day before appellant was injured and in his absence. Under these circumstances, when required to go upon the scaffold, appellant had the right to assume, in the absence of obvious defects, that the master, through its foreman, had made the scaffold reasonably safe for such use as was to be made of it." From these authorities it is perfectly manifest that the rule in the state of Kentucky is that the master is required to furnish the servant a reasonably safe place to work; and, unless it is in the line of servant's duty, he is not required to make an inspection of the place of work to discover the defects and the danger incident thereto, and he is not precluded from recovering of the master when he is injured by defects or dangerous obstructions, unless he knows of them or they are patent to persons of his experience and understanding.

For these reasons, the judgment of the lower court is reversed, and the case remanded for further proceedings consistent therewith.

CENTRAL OF GEORGIA RY. CO. *v.* RAY.

(Supreme Court of Georgia, Aug. 16, 1907.)

[58 S. E. Rep. 844.]

Master and Servant—Machinery in Use—Ordinary Diligence.*—A railroad company, relatively to its employees, is bound to exercise ordinary care in furnishing machinery equal in kind to that in general use and reasonably adapted to the uses to which it is put; and its liability in this respect is limited to a failure to discharge this duty. It is therefore erroneous to charge the jury that if they believe that the engine which killed the plaintiff's husband, for whose homicide the plaintiff sues for damages, was of the kind in general use and reasonably suited for the business for which it was in use, then it would be for them to determine whether or not, "in having one of that character," the railroad company had exercised ordinary care and diligence.

Death—Damages—Instructions.—The judge may refer, in his charge

*For the authorities in this series on the subject of the care required of a master in furnishing appliances, see foot-notes appended to Clippard *v.* St. Louis Transit Co. (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107; foot-notes appended to Collins *v.* Louisville & N. R. Co. (Ky.), 22 R. R. R. 78, 45 Am. & Eng. R. Cas., N. S., 78; foot-notes appended to Roche *v.* Denver & R. G. R. Co. (Colo. App.), 8 R. R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955, where all the preceding authorities in this series are collected.

on the subject of estimating damages for the value of a life, to the decrease in the earning capacity which naturally results from advancing age, probable loss of employment, and inability to constantly labor and secure continuous work. Juries are presumed to be as cognizant of the common phenomena of human experience as the judge; and, if their attention is specially desired to be directed thereto, a timely written request should be made.

Trial—Instructions.—The other attacks on excerpts from the charge relate more to the form of expression than to a misapprehension of the correct rules of law; and, as the attention of the trial judge has been called thereto, they probably will receive due consideration on the next trial.

(Syllabus by the Court.)

Master and Servant—Machinery in Use.*—In respect to the character of the machinery employed by the railroad company, the whole duty of the company to the plaintiff's husband was not necessarily discharged by employing an engine and tender "equal in kind to that in general use and reasonably adapted to the uses" in which they were employed. The qualification to the charge mentioned in the first headnote did not authorize a reversal of the judgment.

(Per Atkinson, J., dissenting.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Emma Ray against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Emma Ray brought her action for damages against the Central of Georgia Railway Company for the negligent killing of her husband, and the jury returned a verdict in her favor. Her petition alleged that her husband was, at the time he was killed, in the employment of the railway company, and engaged in work with an engine used at the time in switching cars in the yards of the company at Macon, Ga. It was his duty to go with the engine and change the switches, that the engines might pass from one track to another in moving cars in the yard. While engaged in changing a switch, that the engine with which he was at work might change to another track, and just as he had straightened himself up and partially turned around, he was struck by another engine of the company, thrown upon the track, and killed. The nature of the work required that it should be done hurriedly. The switch was what is known as a "ground switch," and was worked by a lever which was kept in place by a heavy weight; and, in order to change it, it was necessary that the deceased should place himself in a stooping position, lift

*See foot-note on preceding page.

the lever and weight attached from the ground, and throw it to the opposite side of the switch. The switch in question was located within about 10 inches of where an engine passing on the next track would extend. At the time he was engaged in this work his back was to the engine, which was approaching him from the rear, and he did not and could not have discovered the approach of the engine before he was struck by it. He was or should have been in plain view, if proper lookout had been kept by persons in charge of this engine; and, if proper care had been used, his position of danger could have been discovered by those in charge of the engine, whose duty it was to have discovered him and stopped in time to prevent the injury, or at least to have given warning of its approach. No bell was rung or whistle sounded to give her husband notice of the engine's approach, and at the time her husband was killed the engine was being run at from 10 to 15 miles an hour, which was a dangerous rate of speed at that place, and in violation of a valid municipal ordinance of the city of Macon, which made it unlawful to run an engine at this place at a greater rate of speed than 5 miles an hour, and by reason of the violation of this ordinance her husband was run down and killed. The deceased was entirely free from fault, and his death was caused entirely by the negligence of the agents and employees of the railroad company in placing the switch so near the track, and in running upon him without any warning whatsoever, and in violation of the city ordinance. The earning capacity and expectancy of deceased were also set forth.

By an amendment the plaintiff alleged that the engine which struck the deceased was so constructed that it was impossible for the employees running the engine backwards to keep a lookout or observe the track, because the tender was so high and wide that it completely obstructed and shut out the view of the track from those in charge of the engine, and made it impossible for them to see any one upon the track in the rear of the tender, when the engine was run backwards. The engine which struck her husband was being run backwards, and no proper lookout was kept on the rear of the engine to give warning of its approach, or give notice to those in charge of the same of its close proximity to persons on the track. At the time deceased was killed several engines of defendant were being run in that portion of the yard, and the employees engaged in work in this yard were compelled to be constantly upon the tracks of the company in this yard. This switch was negligently placed by the defendant so near the main line or lead track in the yards as to make it dangerous to the employees of the company who were required to work therein, for the reason that employees engaged at that switch were always in danger of being struck by engines and cars

of the company running along the adjacent track; and this switch was unnecessarily and negligently placed in this dangerous position, and maintained there, in utter disregard to the safety of its employees who were called upon to discharge their duties in this yard. It was the duty of the company to furnish the deceased a safe place in which to work, and in placing this switch in such dangerous proximity to this track the company failed in this duty. The company, knowing of the dangerous position of the switch, and that the deceased would be called upon, in the discharge of his duties, to work at this switch, owed him the duty of giving him warning of the approach of its engine at that time and place. This switch was so placed that by reason of a curve in the track at that place the view was obstructed by cars standing in the yard, making it impossible to discover an approaching train until it was within a very few feet of the switch. The defendant denied the alleged negligence; and to the verdict and judgment in the plaintiff's favor it filed a motion for a new trial, which was overruled, and it excepted.

Wimberly & Jordan and *Jno. I. & J. E. Hall,* for plaintiff in error.

Jno. R. Cooper, Jos. H. Hall, and *Warren Roberts,* for defendant in error.

EVANS, J. (after stating the facts as above). In the amendment to the petition it was alleged that the engine which killed the plaintiff's husband was so constructed that it was impossible for the employees running the engine backwards to keep a lookout, or observe the track, because the tender was so high and wide that it completely obstructed and shut out the view of the track from those in charge of the engine, and made it impossible for them to see any one upon the track in the rear of the tender, when the engine was being run backwards. From the instruction given on this feature of the plaintiff's case it is quite evident that the trial judge construed (and properly so) this allegation as an averment that the engine was not adjusted to the work of switching cars, where the engine was generally employed in moving both backward and forward, and the employment of an engine so constructed might be considered by the jury on the issue of the exercise of ordinary care by the defendant in the operation of an engine so constructed. The court charged: "Relatively to that question as to the construction of the engine, if the jury believe that the engine was of the kind in general use and reasonably suited to the business for which it was in use, then it would be for you to determine whether or not, in having one of that character, they had exercised ordinary care and reasonable care and diligence." This charge is alleged to be erroneous, because, if the jury should believe that the engine was of a kind in general use and reasonably suited to the business for which it was in use,

they should not have been instructed that they might infer that the mere having an engine of this description was a failure to exercise ordinary care in the selection of one of this type. We think the charge is open to the criticisms made of it. A railroad company, relatively to its employees, is bound to exercise ordinary care in furnishing machinery equal in kind to that in general use and reasonably adapted to the uses to which it is put. Alabama Midland Ry. Co. *v.* Guilford, 119 Ga. 523, 46 S. E. 655; Reed *v.* M., K. & T. Ry. Co., 94 Mo. App. 371, 68 S. W. 364. Its liability in this respect is limited to a failure to discharge this legal duty. Atlanta, etc., Air Line Ry. Co. *v.* Ray, 70 Ga. 674. This instruction was calculated to harm the defendant. The plaintiff charged the defendant with negligence (1) in selecting and using this type of engine, and (2) in operating it without lookouts. The defendant contended in reply that it had selected a type of engine such as was in general use and reasonably suited to the use to which it was put, and that the plaintiff's husband knew it operated this engine without lookouts or warnings, and that his death resulted because he was at a place where it was not his duty to be and from his own failure to exercise ordinary care for his safety. The jury may have believed, under the evidence and the instruction of the court, that the defendant was not negligent in the operation of the engine; yet they were told in effect that, even if the engine was of standing type and was reasonably suited to the use to which it was put, still they might find the defendant negligent "in having one of that character."

2. Complaint is made of an omission of the court, when charging on the subject of damages, to call the attention of the jury to the decrease in the earning capacity which naturally results from advancing age, probable loss of employment, and inability to labor and to secure work. In the process of reaching a correct result from the evidence, juries may take into consideration such universal experiences in human life as criteria in weighing the evidence in the particular case. The judge may refer in his charge to such matters as the plaintiff in error complains he omitted in this case. Fla. C. R. Co. *v.* Burney, 98 Ga. 1, 26 S. E. 730. The jury are presumed to be as cognizant of these common phenomena of human experience as the judge; and, if their attention is especially desired to be directed thereto, a timely written request should be made.

3. The attack on the other charges complained of relates more to the form of expression than to a misapprehension of the correct rules of law, and on the next trial the judge in all probability will so adjust his expressions as to relieve them of the criticism made in the assignments of error.

Judgment reversed. All the Justices concur, except ATKINSON, J., who dissents.

ALVES *v.* NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island, June 4, 1906.)

[65 Atl. Rep. 261.]

Master and Servant—Injuries to Servant—Defective Appliances—Knowledge of Defect.*—An employee cannot recover from a railroad company for injuries caused by the breaking of the handle of a hand car by reason of defects in that portion of the handle which is fastened in an iron socket, and which cannot be discovered without removing it from the socket, in the absence of proof of actual knowledge of the defect.

Trespass on the case by Manuel Alves against the New York, New Haven & Hartford Railroad Company. Judgment was rendered in favor of defendant. Heard on petition for new trial. Petition denied, and cause remitted to superior court with direction to enter judgment on verdict.

Argued before DOUGLAS, C. J., and DUBOIS, JOHNSON, and PARKHURST, JJ.

Clark Burdick, for plaintiff.
William P. Sheffield, Jr., Max Levy, and *William R. Harvey*, for defendant.

DOUGLAS, C. J. The plaintiff in this case was assisting in propelling a hand car of the defendant corporation. He stood with his back towards the front end of the car and held a wooden bar which passed across the car, through iron sockets, where it was fixed by screws passing through the iron and into the wood. As the bar was lifted it broke off inside the socket which was nearest to the plaintiff. By the breaking of the bar as he was pressing upwards he lost his balance and fell upon the roadbed, and the car ran over him and injured him. At the trial of the cause in the common pleas division, at the close of the plaintiff's testimony, a verdict was directed for the defendant, and the plaintiff, having duly excepted thereto, brings his petition for a new trial. He alleges, also, certain exceptions to the exclusion of evidence which he has not insisted upon.

We think the plaintiff failed to make out a case for the jury. The accident was caused by a defect in the bar which was not

*For the authorities in this series on the subject of the duties and liabilities of a railroad company, as an employer, with respect to inspecting appliances, see foot-note appended to Gulf, etc., R. Co. *v.* Larkin (Tex.), 19 R. R. R. 235, 42 Am. & Eng. R. Cas., N. S., 235; Wood's Adm'x *v.* Southern Ry. Co. (Va.), 19 R. R. R. 19, 42 Am. & Eng. R. Cas., N. S., 19; Crawford *v.* United Rys. & Elec. Co. (Md.), 17 R. R. R. 527, 40 Am. & Eng. R. Cas., N. S., 527.

obvious and which could not have been discovered without removing the screws and examining the parts of the bar which were concealed by the sockets. In Jones *v.* N. Y., N. H. & H. R. Co., 20 R. I. 210, 37 Atl. 1033, it was held to be the duty of a railroad company to discover and remedy a defect in its cars which could be discovered by reasonable inspection; but we cannot say, as matter of law, that such an inspection as might have discovered the defect in this bar is required of the company. In Burns *v.* N. Y., Prov. & Boston R. R. Co., 20 R. I. 789, 38 Atl. 926, it was held, in the absence of testimony that it is customary for railroad companies (or that prudent men engaged in operating railroad trains have ever considered it essential) to remove the spindles from the drawbars for the purpose of inspecting them, that it was not negligence to omit an inspection of the spindle in that manner.

We think the principle of the latter case is decisive of the case at bar. The exact question was presented in Louisville & N. R. Co. *v.* Hinder (Ky.) 30 S. W. 399 and the court held that "an employee cannot recover from a railroad company for injuries caused by the breaking of the handle of a hand car by reason of defects in that portion of the handle which is fastened in an iron socket, and which cannot be discovered without removing it from the socket, in the absence of proof that the company had actual knowledge of this defect," and held that, on the closing of the plaintiff's testimony, a verdict should have been directed for the defendant.

The petition for a new trial is denied, and the cause is remitted to the superior court, with direction to enter judgment upon the verdict.

CHICAGO UNION TRACTION CO. *v.* GIESE.

(Supreme Court of Illinois, Oct. 23, 1907.)

[82 N. E. Rep. 232.]

Negligence—Elements.*—To constitute actionable negligence there must exist a duty of the person charged to protect the complaining party from injury, a failure to perform the duty, and an injury resulting from the failure.

Same—Evidence—Res Ipsa Loquitur.—While it is a rule that the burden of proving the existence of a duty, its breach, and the resulting injury, is upon plaintiff, yet when a thing causing an injury is shown to be under the management of the person charged, and the accident is one which ordinarily does not happen when proper care is used by those in charge, the accident itself affords evidence, in the absence of an explanation by the party charged, that it resulted from a want of proper care.

Street Railroads—Street Car Leaving the Track—Res Ipsa Loquitur.†—An injury caused by a street car leaving the track and striking a wagon in which plaintiff was riding is within the maxim "Res ipsa

*For the authorities in this series defining negligence, see foot-notes appended to Southern Ry. Co. *v.* Hansbrough's Adm'x (Va.), 24 R. R. R. 469, 47 Am. & Eng. R. Cas., N. S., 469; foot-notes appended to MacFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; Stone *v.* Union Pac. R. Co. (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119; Shandrew *v.* Chicago, etc., Ry. Co. (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; Raymond *v.* Portland R. Co. (Me.), 22 R. R. R. 476, 45 Am. & Eng. R. Cas., N. S., 476; Chesapeake & O. Ry. Co. *v.* Farrow's Adm'x (Va.), 22 R. R. R. 360, 45 Am. & Eng. R. Cas., N. S., 360.

†For the authorities in this series on the question whether a presumption of negligence arises from the mere fact of the occurrence of an injury, see foot-notes appended to St. Louis, etc., R. Co. *v.* Chapman (C. C. A.), 22 R. R. R. 622, 45 Am. & Eng. R. Cas., N. S., 622; Garvick *v.* United Rys. & Elec. Co. (Md.), 20 R. R. R. 615, 43 Am. & Eng. R. Cas., N. S., 615 (collisions between cars or trains and persons on railroad tracks).

For passenger cases on this subject, see foot-notes appended to Enos *v.* Rhode Island Suburban Ry. Co. (R. I.), 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612; foot-notes appended to Pennsylvania R. Co. *v.* McCaffrey (C. C. A.), 23 R. R. R. 23, 46 Am. & Eng. R. Cas., N. S., 23.

For freight cases on this subject, see foot-notes appended to Everett *v.* Norfolk & S. R. Co. (N. Car.), 18 R. R. R. 551, 41 Am. & Eng. R. Cas., N. S., 551; foot-notes appended to Tiller & Smith *v.* Chicago, B. & Q. Ry. Co. (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581; Louisville & N. R. Co. *v.* Brown (Ky.), 24 R. R. R. 81, 47 Am. & Eng. R. Cas., N. S., 81.

For crossing accident cases on this subject, see foot-notes ap-

loquitur," and proof of the injury will justify a recovery unless defendant shows that it was not at fault.

Evidence—Opinions Based on Self-Serving Declarations.‡—The opinions of physicians as to a person's condition, based upon statements made by him while they were examining him to discover the extent of his injuries, but not for treatment, are inadmissible as based upon self-serving declarations.

Appeal—Presentation of Objections in Lower Court—Motion for New Trial—Specification of Errors—Sufficiency.—The ground in a motion for a new trial that the court admitted improper testimony, over objection, is broad enough to include an exception to a refusal to strike out objectionable testimony so as to save the point on appeal.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Action by Albert Giese against the Chicago Union Traction Company. From a judgment of the Appellate Court for the First District affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action by Albert Giese for a personal injury, against the Chicago Union Traction Company, in which a judgment against the street car company for $2,000 has been affirmed by the Appellate Court for the First District. The declaration consists of three counts, the first and second of which charge that the defendant, by its servants, carelessly, improperly, and negligently drove and managed a train, consisting of two coaches, so that the rear car struck the wagon of the plaintiff in which he was riding, and thereby he received the injuries complained of. The charge of negligence in these two counts is general. The third

pended to St. Louis, etc., Ry. Co. *v.* Evans (Ark.), 23 R. R. R. 314, 46 Am. & Eng. R. Cas., N. S., 314.

For the cases on the subject where railroads are sued to recover damages caused by fires set by locomotives, see foot-notes appended to Shipman *v.* Chicago, B. & Q. R. Co. (Neb.), 22 R. R. R. 748, 45 Am. & Eng. R. Cas., N. S., 748; foot-notes appended to St. Louis, etc., Ry. Co. *v.* Dawson (Ark.), 22 R. R. R. 612, 45 Am. & Eng. R. Cas., N. S., 612.

For the master and servant cases on this subject, see foot-notes appended to Southern Ry. Co. *v.* Carr (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

For the authorities stating the general rule on this subject, see foot-notes appended to Byrd *v.* Southern Express Co. (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., N. S., 150.

For stock killing cases against railroads on this subject, see foot-notes appended to Martin *v.* Chicago, etc., Ry. Co. (Wyo.), 23 R. R. R. 306, 46 Am. & Eng. R. Cas., N. S., 306.

‡For the authorities in this series on the subject of the admissibility of medical testimony, see foot-notes appended to Norfolk Ry. & Light Co. *v.* Spratley (Va.), 20 R. R. R. 260, 43 Am. & Eng. R. Cas., N. S., 260.

count charged that the defendant negligently drove a train of two cars at so high a rate of speed that the rear car necessarily and unavoidably left the track, and through the negligence of its servants the car struck the wagon of the plaintiff, thereby injuring him. On May 7, 1902, the appellee and his son, a boy 11 years of age, were going west on Division street, in the city of Chicago, in a wagon drawn by one horse. Appellee was sitting on the north end of the seat, and his son by his left side. Appellee was driving, and his wagon was in the tracks of appellant used for its west-bound cars. There were tracks immediately south and parallel to the tracks upon which appellee was driving upon which appellant ran its east-bound cars. On the south, and almost immediately opposite the place where the injury occurred, appellant's car barns were located, from which tracks ran north, connecting by a sharp curve with the tracks on Division street. A train, consisting of a motor car and a trailer, came out of the car barn, and while passing around the curve to reach the east-bound track the front wheels of the trailer left the track and collided with the wagon on which appellee was riding on the west-bound tracks. Appellee offered no evidence of any defect in the track or the construction of the car, and the only evidence relating to the management of the car is the statement by appellee that the car came around the curve "fast," and by appellee's son that the car was "coming out pretty fast." The errors relied upon for a reversal are the overruling of appellant's motion to direct a verdict, the giving of erroneous instructions, and the admission of incompetent and improper evidence.

John A. Rose and *Albert M. Cross* (*W. W. Curley,* of counsel), for appellant.

Wickett, Meier & Booth, for appellee.

VICKERS, J. (after stating the facts as above). Appellant insists that the court erred in refusing to direct a verdict because the evidence does not show that the derailment of the car was the result of its negligence. We do not find it necessary to decide whether the general statements of appellee and his son that the car in question was "coming fast" can be regarded as such evidence of a negligent rate of speed as to warrant the court in submitting that question to the jury. The first requisite in establishing negligence is to show the existence of some duty and its violation. Negligence consists in the violation of a duty owing by the party inflicting the injury to the person injured. Back of every instance of negligence must be found a duty to the individual complaining, an observance of which would have avoided the injury. To state the principle in other language, in every case involving actionable negligence there must exist three essential elements: First, the existence of a duty on the part of the person charged to protect the complaining party from the in-

jury received; second, a failure to perform that duty; and, third, an injury resulting from such failure. When these elements concur they unitedly constitute actionable negligence, and the absence of any of these elements renders the pleading bad or the evidence insufficient, as the case may be. 2 Cooley on Torts (3d Ed.) p. 1411, and cases cited. Duties may be general and owing to everybody, or particular and owing to a single person only, by reason of his peculiar position. A general duty becomes a personal and particular duty when some individual is placed in a position which gives him special occasion to insist upon its performance. That the burden of proving the existence of the duty, its breach, and the resulting injury is on the complaining party, is so well settled in the law of negligence that it requires no elaboration or citation of authority to sustain it. While this is true, there is a class of cases which are made out by showing the injury and connecting the defendant with it. When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care. This rule of law results from the maxim "*Res ipsa loquitur.*" Many cases are to be found illustrating the application of this rule. In some of them it is said that the rule is an exception to the general rule that negligence will never be inferred, while in others it is not treated as an exception, but is treated as an evidentiary rule, under which the charge of negligence is regarded as proven, *prima facie,* by proof of facts showing that the thing which caused the injury was under the management and control of the defendant or his servants, and that the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. Webb's Pollock on Torts, p. 550. The more accruate statement of the law is that negligence is never presumed, but that the circumstances surrounding a case where the maxim *"Res ipsa loquitur"* applies amount to evidence from which the fact of negligence may be found. In the case before us, all of the elements of the accident were within the complete control of appellant, and the result is so far out of the usual course of things that there is no fair inference that it could have been produced by any other cause than negligence. Experience and observation teach us that with proper care street cars will remain on the tracks. If this were not true, municipalities would not license them to use public streets. If, with proper construction and management, street cars cannot be kept upon their tracks, then the safety of the public would require that they be done away with altogether. It is a matter of common knowledge, however, that it is possible, by the exercise of

ordinary care, to so construct and operate these conveyances that they will not leave the tracks, and when they do so, and inflict an injury upon another who is lawfully in the street and free from contributory negligence, we think that no hardship is imposed upon these corporations to hold that such an injury is within the maxim *"Res ipsa loquitur,"* and that proof of the injury, under the circumstances stated, will justify a verdict, unless such *prima facie* case is met by proof showing that the company is not at fault.

Appellant relies with much apparent confidence on Chicago & Eastern Illinois Railroad Co. *v.* Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243, as an authority against the application of the doctrine of *"Res ipsa loquitur"* to the case at bar. That case is clearly distinguishable from the case in hand. There the plaintiff was struck by a projecting piece of lumber on a passing freight car while the plaintiff was standing at a street crossing. There was no proof as to when, how, or where the car was loaded, nor how long the timber had been projecting, and no proof that the defendant had notice of such condition. The freight car did not leave the track, nor did the timber fall off the car against the party who was injured. This court held in that case that the condition of the projecting timber could be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper. In the case at bar the derailment of the car was out of the usual course of business, and it would not have happened but for some act of negligence, either as to the condition of the car, track or management. There was no error in refusing to direct a verdict in this case.

Appellant complains of the giving of instructions 3 and 4 for appellee. These instructions are not open to the criticism made upon them. There is, however, an error in the ruling of the court as to the admission of evidence for which this judgment must be reversed. On the trial Drs. Hardon and Marcusson were examined, for appellee, as experts, as to the nature and extent of appellee's injuries. Their examination of appellee was not for the purpose of treating him, but to find whether there was any injury and the extent of it. One of them, Dr. Hardon, examined him for the purpose of reporting to the attorneys so that they could determine whether to take his case, and Dr. Marcusson for the purpose of testifying as a witness. These physicians obtained the history of appellee's case from him, and testified, basing their opinions partly upon their own observation and partly upon the statements of the case obtained from appellee. The fact that the physicians based their opinions partly upon the statements obtained from appellee was brought out on the cross-ex-

amination of these witnesses by appellant, who thereupon moved to strike out such portions of their statements as appeared to be based, in whole or in part, upon information obtained from appellee's statements. This motion was overruled by the court except as to the ejaculations of pain testified to by Dr. Marcusson. In his examination Dr. Hardon said: "I was not called to treat the patient at the first examination. As part of the examination I took the history of this accident. I asked him the usual questions to determine his feelings, his pain, and his ability to discharge business. In reaching the conclusions which I reached as to the condition I found and which I concluded existed, which I stated to the gentleman, I took into consideration the history as given me by the plaintiff and the subsequent course of the effect of that injury upon him, and took into consideration the injury, and the effect of it, as he gave it to me, together with the examination; each being a part of the other." This evidence was material and tended to corroborate appellee as to the character and extent of his injury. It has been held by this court that declarations made by an injured party to a physician, not with a view to treatment, are self-serving and inadmissible. West Chicago Street Railroad Co. *v.* Carr, 170 Ill. 478, 48 N. E. 992. In this case this court said (page 483 of 170 Ill., page 994 of 48 N. E.): "We think, however, the correct rule to be deduced from that laid down by Greenleaf, and most conductive to justice, is that such declarations, being in favor of the party making them, are only competent when made as part of the *res gestæ,* or to a physician during treatment, or upon an examination prior to and without reference to the bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant, with a view to the trial." A similar question was before this court in Chicago & Eastern Illinois Railroad Co. *v.* Donworth, 203 Ill. 192, 67 N. E. 797, where it was held that the statement by a physician testifying as a witness for the plaintiff that the latter had lost his power of hearing in his left ear should be excluded when such testimony is not based upon a physician's actual knowledge, but upon the declarations of the plaintiff. See, also, Stevens *v.* People, 215 Ill. 593, 74 N. E. 786; City of Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23. If the statements of a party in his own interest are improper, clearly an opinion based thereon, the value of which depends on the truth of the statements, must for the same reason be rejected, otherwise a party would have, indirectly, the benefit of his self-serving statements which the law will not allow him directly. Our conclusion is that when it developed that the opinions of these physicians were based, in part, upon the statements made by appellee, the court should have stricken out such portions of the evidence of these physicians as were not based upon their own personal examination. Appellee suggests that

this point was not saved in the motion for a new trial. One of the causes set up in the motion for a new trial is that the court admitted, over the objections of appellant, improper, incompetent, and irrelevent testimony on behalf of appellee.

Appellee insists that the ruling of the court to which exception was taken was the refusal to strike out the objectionable testimony, and not in admitting it in the first instance. It is true that the objectionable testimony was not objected to in the first instance, for the reason that its objectionable character was not disclosed until the cross-examination, when appellant immediately moved to strike it out. The ruling of the court in refusing to strike out this evidence was, in effect, a holding that it was competent. In our opinion the grounds set out in the motion for a new trial were broad enough to include the exception preserved on the motion to strike out.

For the error indicated the judgment is reversed, and the cause remanded to the circuit court of Cook county.

Reversed and remanded.

SMITH *v.* CONNECTICUT RY. & LIGHTING CO.

(Supreme Court of Errors of Connecticut, Oct. 22, 1907.)

[67 Atl. Rep. 888.]

Street Railroads—Collision with Vehicles—Last Clear Chance—Proximate Cause.*—Although a person in a buggy does not exercise ordinary care in attempting to cross the tracks in front of a street car, yet if the motorman in charge of the car can by the exercise of due care stop it, and avoid the accident, after the person's danger becomes apparent, his failure to do so is the proximate cause of the accident, and decedent's negligence, not being contributory, is not a bar to a recovery for his death.

Same—Reasonable Rate of Speed of Cars.†—The reasonableness of

*See foot-notes appended to Vicksburg, etc., Ry. Co. *v.* Barmore (Miss.), 19 R. R. R. 144, 42 Am. & Eng. R. Cas., N. S., 144; Birmingham Ry., etc., Co. *v.* Jones (Ala.), 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568; Louisville Ry. Co. *v.* Hoskins' Adm'r (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484; foot-notes appended to Black *v.* New York, etc., R. Co. (Mass.), 23 R. R. R. 44, 46 Am. & Eng. R. Cas., N. S., 44; foot-notes appended to Hanson *v.* Manchester St. Ry. (N. H.), 22 R. R. R. 675, 45 Am. & Eng. R. Cas., N. S., 675; Reid *v.* Atlanta, etc., Ry. Co. (N. Car.), 22 R. R. R. 670, 45 Am. & Eng. R. Cas., N. S., 670; foot-notes appended to Chesapeake & O. Ry. Co. *v.* Farrow's Adm'x (Va.), 22 R. R. R. 360, 45 Am. & Eng. R. Cas., N. S., 360.

†See foot-notes appended to Beier *v.* St. Louis Transit Co. (Mo.), 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281.

a car's speed is measured by the relation of the speed to the circumstances under which it is maintained, having regard to the view and crowded condition of the thoroughfare.

Same—Extent of Rights in Streets.‡—A street car company which operates cars over a highway under a franchise has no greater rights therein than the proprietor of any other vehicle, except that, since the cars can move only on fixed tracks, those who also travel on the tracks must make reasonable efforts to avoid them.

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Action by John B. Smith's administratrix against the Connecticut Railway & Lighting Company for her decedent's death. There was a hearing in damages after a default. From a judgment for plaintiff, defendant appeals. Affirmed.

Action by the administratrix of the estate of John B. Smith to recover damages for negligence resulting in his death, brought to the superior court for Hartford county, defaulted, and heard in damages before Gager, J., who assessed them at $4,000.

William B. Boardman, for appellant.

James E. Cooper, John H. Kirkham, and *Arthur W. Upson,* for appellee.

BALDWIN, C. J. The plaintiff's intestate was driving an active, long-gaited farm horse in a light wagon on a city street. There was a trolley track on it, so laid that at a point some little distance ahead of him it crossed from the middle to the right-hand side of the street. It was necessary that he should cross the track, in order to keep on the proper side of the road, which for him was the right-hand side. A trolley car operated by the defendant was behind him, on a downgrade. The gong was sounding loud and clear. The power was shut off, and the motorman had the car under control by the hand brake. It was running at a speed of from three to five miles an hour. The decedent, when 200 or 300 feet from the place where he lost his life, looked back and saw the car approaching, and it was apparent to him that, at the speed at which it was going, there was plenty of time for him to cross the track in front of it in safety.

‡For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to Olney *v.* Omaha, etc., St. Ry. Co. (Neb.), 23 R. R. R. 300, 46 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to McCarthy *v.* Consolidated Ry. Co. (Conn.), 22 R. R. R. 685, 45 Am. & Eng. R. Cas., N. S., 685; United Rys. & Elec. Co. *v.* Watkins (Md.), 22 R. R. R. 641, 45 Am. & Eng. R. Cas., N. S., 641; foot-notes appended to Indianapolis, T. & T. Co. *v.* Kidd (Ind.), 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366; Weinberger *v.* North Jersey St. Ry. Co. (N. J.), 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351.

It must have then been apparent to any one on board the car, who was on the lookout that the decedent was likely to cross the track at any time. The horse was trotting. Shortly after this, without looking again for the car, the intestate turned across the track in a slanting direction; the horse still trotting, but more slowly. When it became apparent from the car that he was about to cross, it was proceeding at the rate of speed before mentioned, and was from 20 to 25 feet behind the rear end of his wagon. By the use of ordinary care the motorman could have brought it to a stop before it had gone 15 feet farther and before reaching the wagon. He was inexperienced, became confused, and negligently and unskillfully released the brake, which had been partly set, so that the car moved forward more rapidly than before, striking the hind wheel of the wagon, and throwing the intestate out, in a manner which resulted in his death.

The trial court found that when the intestate started to cross the track, knowing that a car was coming a short distance behind, and without then looking to see how far away the car might be, he ran into a position of danger and was not exercising ordinary care, and that the motorman did not exercise ordinary care in attempting to stop the car after the danger to the intestate became apparent; whereas, had such care been exercised, or had the speed of the car not been increased, the accident would not have happened. These conclusions are supported by the facts specially set forth, as above recited, and justified the award of substantial damages.

Negligence is only deemed contributory when it is a proximate cause of the injury. That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation. If, after an act of omission constituting negligence on the part of one injured at a railroad crossing, the railroad car or cars might have been so controlled, by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and so the plaintiff's negligence no longer a proximate cause, and therefore not a bar to his recovery. Grand Trunk Railway Co. *v.* Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; Parkinson *v.* Concord Street Railway, 71 N. H. 28, 51 Atl. 268; Isbell *v.* New York & New Haven R. R. Co., 27 Conn. 393, 404-413, 71 Am. Dec. 78. The act of the intestate was a careless one, but, had the speed of the car not been subsequently increased, there would have been no collision between the two vehicles. This increase was not intentional, but it was equally deadly. At a moment when it was apparent that the intestate was about to cross the tracks, and

when the car could have readily been stopped, it was allowed by an unskillful act of the motorman to shoot ahead with accelerated velocity. This act was the proximate cause of the intestate's death. The negligence of the latter was not, because, after he was guilty of that negligence, there arose a new and intervening cause for the collision, without which the accident would not have occurred.

The complaint alleges that the defendant negligently ran the car on a steep downgrade at an unreasonably high rate of speed and not under proper control. It is contended that the rate of speed proved was so small that it could not be deemed unreasonably high. The reasonableness of the speed at which a car is run is to be measured by the relation of that speed to the particular circumstances under which it is maintained. A speed of twenty miles an hour might not be unreasonable in the open country, where the view is unobstructed, and there are no travelers in sight. A speed of three or four miles an hour might be unreasonable in a crowded street, when other vehicles or pedestrains were on the tracks in front or obviously on the point of crossing them. The proprietor of a street car who runs it over a highway under a franchise from the state has no greater rights as to the manner of the use of that part of the highway on which the car is run than the proprietor of any other vehicle, except that, since, it can move only on fixed tracks, it is incumbent on those also traveling upon them to make reasonable efforts to keep out of the way of an approaching car. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 489, 37 Atl. 379, 37 L. R. A. 533. The immediate cause of the injury to the intestate was the sudden increase of the speed of the car, due to the release of the brake. This was a change of conditions which he had no reason to anticipate, and it proceeded from a careless act of a servant of the defendant while engaged in the duties of his service.

There is no error. The other Judges concurred.

SAWYER *v.* ROANOKE R. & LUMBER CO.

[58 S. E. Rep. 598.]

Railroads—Injury to Person on Track—Negligence.*—A company, operating a railroad for the purpose of hauling logs, has the duty of keeping a lookout in the direction its train is going for the purpose of avoiding injury to persons on the track apparently unconscious, though it is a remote place, with no one there, or likely to be there, except its own employees, some of whom are engaged in cutting out the way, and some in laying track.

Same—Injury Avoidable Notwithstanding Contributory Negligence.*—Even if one was negligent in going on the track of a logging railroad, yet there was no contributory negligence on his part; he having been struck by lightning and rendered unconscious, and the train which ran over him having been far enough away and going slow enough to have allowed him to be seen and train to be stopped in time to avoid the accident, had a lookout been kept.

Evidence—Admissions in Answer.—Plaintiff may put in evidence an admission in the answer, it being an admission of a distinct and separate fact relevant to the issue, though it is only part of a paragraph; the rest in no way modifying or altering the fact.

Appeal from Superior Court, Beaufort County; W. R. Allen, Judge.

Action by J. L. Sawyer against the Roanoke Railroad & Lumber Company for personal injury alleged to have been caused by defendant's negligence. Judgment for plaintiff. Defendant appeals. Affirmed.

See 55 S. E. 84.

There was evidence tending to show: That in May 1904, plaintiff was run over and seriously injured by a logging train of defendant company, while he was in the employment of the defendant and engaged in cutting out its right of way. That defendant had constructed a railroad track of iron rails from Slatersville, a station on the Norfolk & Southern, to a tract of timber about five miles out, and at the time of the injury was engaged in operating a logging train, by which the logs, as they were cut and loaded, were hauled over the spur track to Slatersville, and thence over the line of the Norfolk & Southern to Plymouth, where

*For the authorities in this series on the subject of logging railroads, see foot-notes appended to Arkadelphia Lumber Co. *v.* Smith (Ark.), 24 R. R. R. 514, 47 Am. & Eng. R. Cas., N. S., 514; Conine *v.* Olympia Logging Co. (Wash.), 22 R. R. R. 568, 45 Am. & Eng. R. Cas., N. S., 568; Hemphill *v.* Buck Creek Lumber Co. (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411; Wiest *v.* Coal Creek R. Co. (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

defendant's mill was situated. That the plaintiff was with a gang of hands engaged in cutting out a right of way through this timber, and as this was done another gang would lay the track, when the train—consisting on this day of a locomotive and several logging cars—would be moved backwards down the track, and the timber logs that had been cut from and on either side of the track were loaded onto the train. That this loading was done chiefly by a skidder, a machine which was placed on the rear car, being in front as the train was moving—a large machine consisting of an engine, cable, etc., which was inclosed in a building or large box several feet wider than the car on which it was placed, and 8 or 10 feet high. This box, inclosing and protecting the machinery, had a door and perhaps a window at the rear, from which those who were engaged in operating the skidder could, when required, look down the track, and there was a door and steps for entrance at the front of the skidder. That several hands were required to operate the skidder when the loading was being done, and some were on the car at the time of the injury. That when the track was laid the engine would back the train along the same, and the skidder would draw in and load the logs from either side of the track onto the logging cars. That some of the hands were engaged in the woods, some cutting the right of way, some were engaged with another machine at the end of the track, and plaintiff himself, with one Billie Boyd, was engaged in grinding plaintiff's ax some 10 or 12 feet from the track, when a thunder and rain storm came up, and plaintiff and Boyd started along the track toward the skidder, with the intention of going into the same for shelter. The train and the skidder on the front car was at this time being backed down the track toward plaintiff at the rate of about 2 miles an hour, and could have been stopped within a distance of 15 feet. That as plaintiff and Billie Boyd were so moving down the track to take protection in the skidder they were struck by a bolt of lightning; Boyd being instantly killed and plaintiff knocked down and rendered unconscious, remaining so until he was run over by the train. The place where the plaintiff fell and remained upon the track was 75 yards ahead of the moving train, on a straight track, and in view of the hands and employees in the train, if any had been looking. Three issues were submitted: (1) As to defendant's negligence; (2) contributory negligence on part of plaintiff; (3) damages. Under the charge of the court there was verdict for the plaintiff. Upon judgment thereon, defendant excepted and appealed.

Small & MacLea, for appellant.

Bragaw & Harding, Nicholson & Daniel, and *Ward & Grimes,* for appellee.

HOKE, J. (after stating the case as above). The judge below

imposed upon the defendant the duty of keeping an outlook along the track in the direction in which the train was moving, and in this connection charged the jury that, if they found the facts to be that the defendant company was operating a railroad for the purpose of hauling logs, and operating an engine and cars, the law imposed upon it the duty to keep a lookout for the purpose of avoiding injury to persons on the track apparently unconscious, and if it failed in this duty it was negligent, and if such failure was the real and proximate cause of the plaintiff's injury they would answer the first issue "Yes," etc.

It is urged for error that, on account of the remote placing of this occurrence, with no one ahead along the track, or likely to be there, except its own employees, whom they had every reason to believe were there alive and in health and in proper possession of their faculties, the judge should have charged the jury that upon the entire testimony, if believed, there was no negligence shown on the part of the company, and the jury should answer the first issue "No." But we are of opinion, and do hold, that the charge of the court correctly expresses the law applicable to the case, and that this assignment of error cannot be sustained. These logging roads, in various instances, and in different decisions, have been described and treated as railroads, and held to the same measure of responsibility and the same standard of duty. Hemphill *v.* Lumber Company, 141 N. C. 487, 54 S. E. 420; Simpson *v.* Lumber Co., 133 N. C. 96, 45 S. E. 469; Craft *v.* Lumber Co., 132 N. C. 156, 43 S. E. 597. And it is well established that the employees of a railroad company engaged in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of this duty. Bullock's Case, 105 N. C. 180, 10 S. E. 988; Dean's Case, 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902; Pickett's Case, 117 N. C. 616, 23 S. E. 624, 30 L. R. A. 257, 53 Am. St. Rep. 611. This particular duty arises, not so much from the fact that railroad companies are common carriers, or *quasi* public corporations, as from the high degree of care imposed upon them on account of the dangerous agencies and implements employed and the great probability that serious, and in many instances fatal, injuries are almost certain to result in case of collision. As said by Burwell, J., in Haynes *v.* Gas Company, 19 S. E. 346, 114 N. C. 211, 26 L. R. A. 810, 41 Am. St. Rep. 786: "The utmost degree of care, so far as skill and human foresight can go, is required, for the reason that a neglect of duty is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance." And quoting from Ray on Negligence, p. 53: "As a result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the ex-

ercise of that amount of care and skill in order to prevent accidents." These reasons apply with equal force to logging roads, when their trains are operated by steam or other mechanical power, and are of such exigent nature as to impose this requirement of keeping an outlook as an arbitrary duty, whether in remote or more populous localities. Certainly, on the facts disclosed by this testimony, there should be no relaxation of the rule. Some of the employees were ahead engaged in cutting out the way, others in laying down the track, and yet others were at work at the end of the track with another machine of the same kind. They engaged in rough work, and not unlikely to be in and upon the track at different places, and at times in different ways to be down and helpless upon it; and it was a negligent act to back a train in their direction without keeping an outlook. The duty is imposed because some injury, and serious injury, was likely to follow from its neglect, and when such injury does follow it is no answer that the injured party was down and helpless from some unusual or unexpected cause. Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528; Hudson *v.* Railway, 142 N. C. 198, 55 S. E. 103; Horne *v.* Power Co., 144 N. C. 375, 57 S. E. 19. As stated in Hudson *v.* Railway, 55 S. E. 105, 142 N. C. 198, the correct doctrine is as follows: "In order that a party may be liable for negligence, it is not necessary that he could have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

Defendant further contends that on the entire evidence the plaintiff was guilty of contributory negligence, and objects to the following part of the charge on that question: "If you find from the evidence that defendant was backing its train down its track, that the plaintiff fell on the track in an apparently unconsious condition, that when he so fell he was far enough from the train for it to have been stopped in time to have avoided the injury, that the defendant failed to keep a lookout, and that if a lookout had been kept the defendant, by the exercise of ordinary care, could have discovered that plaintiff was on the track, in an apparently unconscious condition, in time to stop its train and avoid the injury, then the plaintiff's negligence, if any would not be contributory; and if you so find you will answer the second issue 'No.'" We think this position is also correct, and clearly states the law applicable to the issue. A negligent act of the plaintiff does not become contributory unless the proximate cause of the injury, and although the plaintiff in going on the track may have been negligent, when he was struck down

and rendered unconscious by a bolt of lightning his conduct as to what transpired after that time was no longer a factor in the occurrence; and, as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury, its negligence became the sole proximate cause of the injury, and the act of the plaintiff in going on the track, even though negligent in the first instance, became only the remote, and not the proximate or concurrent, cause. This responsibility of a defendant by reason of a negligent failure to avail itself of the last clear chance to avoid an injury is sometimes submitted to a jury under a separate issue, and, while it is sometimes desirable, it is not always necessary, so to present it, and the trial judge in his discretion, as he did in this instance, may submit the proposition and have same determined by his charge on the issue as to contributory negligence. The same course was pursued by the judge and approved on appeal in Pickett's Case, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611. The defendant in the present case has been fixed with responsibility because of its negligent failure to avail itself of the last chance to avoid injury, and for that alone, and the judge below properly told the jury in effect that, if this were true, the act of the plaintiff in going on the track in the first instance, even if negligent, would not bar a recovery, because only the remote cause of the injury, and therefore not contributory.

The court below also correctly ruled that plaintiff could put in, as an admission on the part of the defendant, a section of the answer, as follows: "And said machine ran upon plaintiff, injuring his arm so that same had to be amputated." This is an admission of a distinct and separate fact relevant to the inquiry, and, though it was only a part of an entire paragraph, plaintiff was not required to put in qualifying or explanatory matter inserted by way of defense, and which in no way modified or altered the fact. Hedrick *v.* Railroad, 136 N. C. 510, 48 S. E. 830; Lewis *v.* Railroad, 132 N. C. 382, 43 S. E. 919.

There is no error, and the judgment is affirmed.

No error.

DAVIS *v.* PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, June 3, 1907.)

[67 Atl. Rep. 777.]

Negligence—What Constitutes.*—A railroad company is not negligent in removing bags of phosphate from a station, in the course of affairs, and piling them on its own premises abutting on a public highway, and covering them with tin, the glare of which from the sunlight frightens a horse and injures the person driving it.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Chester County.

Action by Charles W. Davis against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELLS, MESTREZAT, POTTER, and ELKIN, JJ.

John J. Pinkerton, for appellant.
A. M. Holding, for appellee.

ELKIN, J. In the consideration of this case it must not be overlooked that no question involving the duties or liabilities of a common carrier arises. The appellant must be treated as an individual owner of land, subject to no higher degree of care, nor liable in any other manner than a private owner of real estate abutting on the public highway. The rule established in this case will apply generally to the owners of real estate throughout the commonwealth.

The appellant was rebuilding its freight-warehouse at a certain station along its lines. To enable it to proceed with this work it became necessary to temporarily remove the goods and merchandise deposited in the freight station from the inside of the building. On the evening of December 1, 1905, five bags of phosphate were taken from the inside of the warehouse and temporarily placed outside on the premises of the defendant company. Three of the sacks were placed upon the ground, the remaining two on top of them, and as a protection against the rain and weather the five sacks thus placed were covered with a piece of old tin roofing, painted side down and bright side up.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams and saddle horses, see foot-notes appended to Everett *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 259, 46 Am. & Eng. R. Cas., N. S., 259; foot-notes appended to Baltimore, etc., R. Co. *v.* Slaughter (Ind.), 22 R. R. R. 333, 45 Am. & Eng. R. Cas., N. S., 333.

It became necessary to remove the sacks of phosphate from the inside of the station, because the old building was being torn down while the new warehouse was in course of construction. The sacks of phosphate were deposited upon the premises of the defendant company 25 feet distant from the middle of the public highway and 7½ feet from the side of the road. On the following morning, about sunrise, the appellee was driving along the public highway, and when at a point about 50 feet away from the place where the phosphate was piled up his horse shied, made a sudden plunge to the side of the road, where the wheels of his wagon struck some flagstones crossing the ditch, the singletree broke, he was thrown out, and sustained the injuries for which damages are claimed in this action. The negligence charged in the statement of claim was that the defendant had so negligently and carelessly placed the bags of phosphate, covered with the tin roofing, near the public highway, as to frighten ordinarily gentle and well-trained horses. The case was tried in the court below, and is argued here, on the theory that the negligence consisted in covering the bags of phosphate with tin roofing bright side up, so that the horse took fright at the glare or reflection of the rays of the sun across the highway, thus causing the injuries about which complaint is made.

The burden is on the plaintiff in every such case to affirmatively prove the negligent acts complained of. In this case the only evidence offered on the question of negligence was that which established the facts hereinbefore recited. Are these facts sufficient to convict the appellant of negligence? What act was done in this case to justify a finding that ordinary care had not been exercised under the circumstances? Appellant was the custodian of the phosphate and owner of the tin roofing. It certainly cannot be seriously contended that the defendant company did not have the right to carry the bags of phosphate from the inside of the building and deposit them temporarily on its own premises on the outside, or that for the purpose of protecting them from the rain it could not cover them with the tin roofing. Nor do we think that the glare of sunlight theory, on which appellee relies to sustain this action, is sound in principle. It burdens an owner of real estate with too high a degree of care, and is not sustained by either reason or authority. Such a rule would make it the duty of appellant in this case, and an owner of real estate in every case, to anticipate that during the time the particular thing made of tin was placed on its or his own premises a horse might be driven along the public road while the sun was shining, and that the rays of sunlight might strike the tin object at such an angle as to reflect their light across the highway in a manner calculated to frighten horses. Such a degree of care is not required, even as between master and servant; much less between parties where no such relation exists. It will not do to say that

a tinsmith may not exhibit his wares on his own premises; or a blacksmith may not store farm utensils, machinery, or other things brought to him for repair, around his forge; or that a merchant may not display his goods on his own property; or that a farmer may not pile sacks of fertilizer or grain in his own fields, and if need be, cover them with a tin roof, without being mulcted in damages because a horse, well broken or otherwise, happens to shy at them while being driven on the highway nearby. These are the ordinary risks in everyday life, which must be assumed by the individual who drives his horse on the public road. If the horse shies at objects, not extraordinary and frightful in construction or operation, placed on the premises in the usual course of business of the abutting property owner, and injuries result to a traveler on the highway, they are *damnum absque injuria.*

It seems to be conceded by the learned counsel for appellee that the only ground upon which a recovery can be sustained in this case is that appellant failed to exercise ordinary care, because the tin roofing was placed on the sacks bright side up. Our cases would be examined in vain for authority to support this position. We cannot believe there is authority in any jurisdiction for holding a person guilty of negligence and liable in damages because he placed on his own premises a piece of tin roofing down side up, instead of down side down. Suppose both sides of the tin roofing were bright, neither side painted; could it then be said to be negligence because it was used as a covering for the bags? Certainly not. The appellant owed the appellee no duty, except that as an abutting property owner it could not so recklessly, or wantonly, or negligently make use of its property as to interfere with his rights on the highway. Every case of this character is based on the theory that the defendant has been negligent in the performance of a duty owed the complaining party. If no duty is owed, there can be no negligence in failing to perform it; or, if the alleged duty sets up a higher standard of care than the law requires, failure to observe it will not make the party so failing answerable in damages. A farmer preparing his fields for the sowing certainly has the right to pile a few sacks of grain in the fence corner without being liable for damages because a horse driven along the highway shies at them. The principle is very well stated by Mr. Justice Green in Piolett *v.* Simmers, 106 Pa. 95, 51 Am. Rep. 496, wherein it was said: "If a farmer may not have a barrel of cider, a bag of potatoes, a horse power, a wheelbarrow, or a wagon standing on his own premises by the side of a highway, except at the risk of having his estate swept away in an action for damages occasioned by the fright of an unruly horse, the vocation of agriculture will become perilous indeed." The principle is freely conceded that every person must so use his own property as not to injure others,

and if he in a reckless, wanton, and willfully negligent manner makes such use of his property as to injure others he may be held liable in damages. It is equally true, however, that an owner of real estate has the right to use his property for every lawful purpose for which he may desire to use it, and is only required to exercise ordinary care in that use, in order to relieve him from liability for damages on account of injuries incidentally resulting to a traveler on the highway.

Judgment reversed, and is here entered for defendant.

MESTREZAT, J., dissents.

WOLF *v.* CITY RY. CO.

(Supreme Court of Oregon, Aug. 20, 1907.)

[91 Pac. Rep. 460.]

Trial—Withdrawal of Testimony.—Where the undisputed circumstances show the testimony of a witness cannot by any possibility be true, it is the duty of the court to withdraw such testimony from the jury.

Street Railroads—Injury to Persons on Track—Actions—Evidence—Sufficiency.—In an action for the death of plaintiff's intestate, caused by his being struck by a street car, evidence examined, and that of a certain witness for plaintiff held not so opposed to all reasonable probabilities as to require its exclusion, as a matter of law, from the jury.

Same—Contributory Negligence of Person Injured.*—A person about to cross a street at a crossing is not bound to wait because

*See Heying *v.* United Rys. & Elec. Co. (Md.), 22 R. R. R. 673, 45 Am. & Eng. R. Cas., N. S., 673 (one who, on arriving at intersection of streets, looks, but seeing no car, proceeds to cross track; but, before crossing, looks again, and though seeing car coming, tries unsuccessfully to cross before it arrives, is guilty of contributory negligence); Indianapolis Trac. & Term. Co. *v.* Kidd (Ind.), 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366 (pedestrian was not bound to assume that she would be run into by car approaching from rear at excessive speed, in broad daylight, on straight track without warning); McCarthy *v.* Consolidated Ry. Co. (Conn.), 22 R. R. R. 685, 45 Am. & Eng. R. Cas., N. S., 685 (right to attempt to drive across track in face of approaching car); Hornstein *v.* Rhode Island Co. (R. I.), 14 R. R. R. 401, 37 Am. & Eng. R. Cas., N. S., 401 (pedestrian struck by car, which he had seen before he attempted to cross track); Chauvin *v.* Detroit United Ry. (Mich.), 11 R. R. R. 795, 34 Am. & Eng. R. Cas., N. S., 795 (question for jury where driver failed to look a second time, after seeing cars approaching from both directions from a considerable

a car is in sight; but if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence, as a matter of law, to attempt to do so.

Same—Question for Jury.†—Whether a speed of 26 or 29 miles an hour by a street car at a much-used crossing is reasonable is for the jury.

Same—Care Required in Operation.†—It is the duty of a street railway company, in operating its cars at street crossings, to use ordinary care to avoid injury, regardless of whether the rate of speed has been limited by statute or ordinance, or not.

Same—Evidence—Sufficiency.—That at the time a pedestrian was struck by a street car there were seven persons at or near the crossing authorized a finding that the street was much used.

Same.—Principles of law governing the management of trains propelled by steam power and those propelled by electricity are not identical.

Appeal—Excessive Verdict—Question of Fact.—The refusal to set aside a verdict as excessive cannot be reviewed on appeal; the question being one of fact, and not of law.

distance); Kansas City-Leavenworth R. Co. *v.* Gallagher (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750 (right to cross in front of approaching electric car); Wolf *v.* City & Suburban Ry. Co. (Ore.), 18 R. R. R. 201, 41 Am. & Eng. R. Cas., N. S., 201 (one who in broad daylight stops beside a street car track till the car approaching at an unlawful speed is within ten feet of him, when he attempts to cross in front of it, is guilty of contributory negligence, as matter of law, barring recovery for his injury); Portsmouth St. R. Co. *v.* Reed's Adm'r (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65 (in stepping in front of moving street car when it was too close for collision to be avoided by utmost care on part of those in charge of car, prevented a recovery); Schwanewede *v.* North Hudson County R. Co. (N. J.), 4 R. R. R. 191, 27 Am. & Eng. R. Cas., N. S., 191 (if it appears that motorman is not going to respect your right to cross street first, you must wait or you are guilty of contributory negligence); Goldmann *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 14 R. R. R. 582, 27 Am. & Eng. R. Cas., N. S., 582 (driving over tracks after seeing approaching car, without looking again until too late); Omaha St. Ry. Co. *v.* Mathiesen (Neb.), 18 R. R. R. 509, 41 Am. & Eng. R. Cas., N. S., 509 (attempting to drive across tracks in front of approaching street car); Roenfeldt *v.* St. Louis & S. Ry. Co. (Mo.), 13 12 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470; West *v.* Northern Pac. Ry. Co. (N. Dak.), 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655; Bunyan *v.* Citizens' Ry. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 246 (indifference to approaching car of party injured); O'Connell *v.* St. Paul City Ry. Co. (Minn.), 4 Am. & Eng. R. Cas., N. S., 60 (attempt to cross in front of moving street car); McDivitt *v.* Des Moines St. R. Co. (Iowa), 6 Am. & Eng. R. Cas., N. S., 106; Blaney *v.* Electric Traction Co. (Pa.), 10 Am. & Eng. R. Cas., N. S., 560.

†For the authorities in this series on the subject of the care required of those in charge of street cars to regulate the speed of cars to avoid collisions with other users of streets, see foot-notes appended to Beier *v.* St. Louis Transit Co. (Mo.), 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281.

Wolf *v.* City Ry. Co

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action by Mollie Wolf, administratrix of the estate of Isaac Wolf, deceased, against the City & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Lord and *E. B. Seabrook,* for appellant.
A. Bernstein and *D. S. Cohen,* for respondent.

MOORE, J. This is an action by Mollie Wolf as administratrix of the estate of her husband, Isaac Wolf, deceased, against the City & Suburban Railway Company, a corporation, to recover damages resulting from his death, which was caused by his being struck by one of the defendant's cars, August 26, 1902, in the city of Portland. The negligence alleged as a basis for the recovery is that the car causing the injury was being run down a steep incline on First street, from Montgomery to Mill street, at a reckless, dangerous, and excessive rate of speed, and without any warning being given of its approach to the crossing at Mill street, by reason of which carelessness, and without any fault on his part, Wolf sustained the injury, at the intersection of First and Mill streets, a public crossing, which resulted in his death. The answer denies the material allegations of the complaint, and avers that at the time of the accident the defendant's agents and servants were exercising due care and caution in conducting and managing the car, and that the hurt complained of was caused by the contributory negligence of plaintiff's intestate. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, judgment was rendered against the defendant for the sum of $5,000, and it appeals, assigning as error, *inter alia,* the action of the court in refusing to grant a judgment of nonsuit at the conclusion of plaintiff's case, and in denying a request to direct the jury to return a verdict for the defendant when all the testimony had been submitted.

A former judgment in this action for the sum of $500 was reversed in consequence of the court's refusal to grant a nonsuit. Wolf *v.* City Railway Co., 45 Or. 446, 72 Pac. 329, 78 Pac. 668. The testimony produced at the last trial is subtantially the same as that given at the prior hearing, except that one S. Price, who had not theretofore been called by either party, appeared as plaintiff's witness; and hence a determination of the errors alleged must rest upon a consideration of his declarations under oath, when examined in connection with other evidence. Before reviewing his testimony, however, it is deemed proper to call attention to the *locus in quo* where the injury occurred. The testimony shows that First street, in the city of Portland, extends northerly on a downgrade from Montgomery to Mill street, which highways cross it at right angles, and the blocks situated between the two tracks is 5 feet and 8 inches from center to

the streets mentioned 60 feet in width; that the defendant owns two parallel tracks on First street, the rails of each of which are placed 3 feet and 6 inches from center to center, and the space between the two tracks is 5 feet and 8 inches from center to center, of the rails; that the cars, which are operated by electricity, in going north run on the east track, and those proceeding in an opposite direction pass over the west line; that double-truck car No. 64, which struck the decedent, is 28 feet long, and 34 persons can be seated therein, but at the time of the injury there were on the car 53 passengers, a motorman, and a conductor.

Price's testimony is to the effect that at the time of the accident he was standing, with others, at the northeast corner of First and Mill streets, awaiting the approach of a car going north, to become a passenger thereon; that he first saw Wolf going south on the west side of First street and thence nearly across Mill street, where he turned southeasterly to the south cross-walk on the latter street, and as he reached the west line of the rails the witness first saw the car up the hill coming down fast; that he did not hear any bell rung, nor was the speed of the car slackened; that when Wolf reached the east line of rails the car was about 50 feet south of Mill street, and before he could cross the track he was struck and injured by the car, which passed entirely across the street before it was stopped. On cross-examination the following questions were asked, and responses thereto made: "Q. Where was the car when you first saw it? A. I saw it about Montgomery street, as soon as it came up the hill. * * * Q. Was it at Montgomery street when you saw it first? A. That is something I could not tell you. Q. Will you swear it was as far up as Montgomery street when you first saw it? A. I could swear it was a block away when I seen it. Q. Where was Mr. Wolf when you first saw the car? A. He was on the first track—on the west track. Q. When you first saw the car, Mr. Wolf was then on the west track, the one the cars run up on? A. Yes; on the west track. Q. And where was the car then? How far up? A. A block. Q. Up at Montgomery street, one block away? A. Yes. Q. Was Mr. Wolf walking at a tolerably brisk sped, or was he going very slowly? A. He was walking pretty briskly. Q. And he walked right along all the time and did not stop? A. Yes. Q. You looked at him all the time? A. Yes. * * * Q. When Mr. Wolf came up the track, did you notice whether he looked up or down to see whether there was any car coming? A. I noticed that he kind of looked in the beginning of his going on Mill street. I noticed that when he went in on Mill street—I noticed that when he went in to cross on Mill street—he turned in and looked a little to see if any car was coming. * * * Q. Was there anything to obstruct his view, if he looked up the street from where he was? A. Nothing

in the way. It was uphill. Q. There was nothing in your way? A. Nothing in my way."

It is argued by defendant's counsel that Price's testimony is so opposed to all reasonable probabilities as to require its exclusion as a matter of law from the jury, leaving the case as it stood at the former appeal; and, this being so, errors were committed as alleged. There are certain facts of such general notoriety that they are assumed to be known by a court without any proof thereof (B. & C. Comp. § 719) and if the testimony of a witness transcends the laws of nature it is undoubtedly the duty of a court to withdraw such testimony from the consideration of the jury (Smitson *v.* Southern Pacific Co., 37 Or. 74, 60 Pac. 907). Thus, in Blumenthal *v.* Boston & Maine Railroad, 97 Me. 255, 54 Atl. 747, it was ruled that, when the undisputed circumstances show that the story told by a witness upon a material issue cannot by any possibility be true, it is incumbent upon the court to take such testimony from the jury. In that case the plaintiff was hurt by a collision with the defendant's train, after he had successfully crossed two of its tracks; and in referring to the circumstances of the injury, as detailed by the party suffering therefrom, Mr. Chief Justice Wiswell makes the following observation: "The plaintiff, according to his own testimony, was driving at a fast walk, and witnesses for the plaintiff testified that in their judgment the speed of the freight train was from 15 to 20 miles an hour. Assuming these estimates to be correct, when the plaintiff was upon the first track, with an unobstructed view of the railroad easterly for a distance of between 300 and 400 feet, the train was only from 125 feet to 150 feet distant from the crossing, because the speed of the train was only five or six times that of the plaintiff, and they came into collision after the plaintiff had traveled a distance of 25 feet. Consequently, when the plaintiff was upon the first track, 25 feet distant from the place of collision, he had an unobstructed view of the approaching train, which was not more than 150 feet distant on the track from the crossing. If the relative speed of the freight train was not as great as the witnesses have estimated, then, of course, the train was still nearer the crossing at the time the plaintiff was upon the first track. There is no controversy about these facts. They are shown by the testimony introduced by the plaintiff, and by the plan which the plaintiff used and which is made a part of the case. From these facts one of these two conclusions is irresistible: Either the plaintiff failed to take such precautions as to looking and listening before attempting to cross the third track as have been laid down by all authorities as indispensable to his right of recovery, or else he did look and saw the approaching train, and took his chances of safely crossing in front of it. In either event his negligence contributed to the accident, and in accord-

ance with the settled law of this state that negligence will preven his recovery." In Spiro v. St. Louis Transit Co., 102 Mo. App. 250, 76 S. W. 684, Mr. Justice Goode, discussing the legal principle under consideration, remarks: "Verdicts resting on evidence which looks contrary to the ordinary course of nature are not infrequently set aside, and retrials directed, by appellate courts, as a proper precaution against an unjust outcome of litigation. While it is fundamental that juries must weigh evidence and trial judges revise their findings, instances happen in which, from one cause or another, this practice so obviously failed to work out a right result that an imperative call is heard to supplement it by an exceptional procedure in order that justice, the end of all procedure, may not be frustrated. This prerogative of courts of error is sparingly employed; but that it exists, as an emergency expedient, for the correction of verdicts palpably wrong, is certain. The appropriate use of it does not require a court to be convinced that the jury found an event to have occurred that was physically impossible or miraculous. It is enough if the event found was so improbable according to the ordinary operation of physical forces, or was so overwhelmingly disproved by credible witnesses, as to compel the conviction that the jury either failed to weigh the evidence carefully, or drew unwarranted inferences, or yielded to a partisan bias." So, too, in Stafford v. Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036, Mr. Justice Marshall, commenting upon the claim respecting the relative speed of a car and of a vehicle in which the plaintiff was riding, says: "The idea that the car moved from a point where it was out of sight from plaintiff's point of view when she looked to where it was when the horses became frightened, a distance of some 275 feet, while the horses traveled but about 20 feet, making the speed of the car somewhere about 50 miles per hour, or twice as great as the most extravagant testimony of plaintiff's witnesses puts it, is as well within the bounds of the ridiculous, we venture to say, as anything that has heretofore received serious consideration by a trial court or jury. We cannot believe for a moment that the learned trial court or the jury believed that such a thing could be within reasonable probabilities, or that the case was submitted to the jury upon any such theory."

The defendant's counsel invoking the rule enunciated in the cases from which the foregoing excerpts have been taken, insist that, as it appears from Price's sworn statements Wolf passed from the west rail of the west track to a point about 12 inches east of the east rail of the east track, a distance of 13 feet and 8 inches, where he was struck by the corner of the car, while it was going from Montgomery street to Mill, a space of 200 feet, shows that the car must have traveled more than 14 inches faster than he did; and, assuming that Wolf walked at the mod-

erate rate of 3 miles an hour, when the witness said, "He was walking pretty briskly," demonstrates that the car was going at a greater rate of speed than 42 miles an hour, which conclusion is so improbable as conclusively to show that the testimony given by Price, as an attempt to establish a probative fact, is worthless, and should have been rejected as false, and hence an error was committed in denying the motion for a judgment of nonsuit. It was admitted at the trial that, though the streets where the accident occurred are 60 feet wide, the distance from curb to curb of such highways is only 36 feet, and, as Price was standing at the northeast corner of First and Mill streets, he must at least have been more than 36 feet north of where Wolf was at the time the latter was injured. It will be remembered that Price testified that when he first saw the car Wolf was by the west track, and the car was then about at Montgomery street. On cross-examination he was asked, "Was it at Montgomery street when you saw it first?" and answered, "That is something I could not tell you." He further said, "I could swear it was a block away when I seen it." In reply to the inquiry, "Up at Montgomery street, one block away?" he said, "Yes." If Price's last answer can be construed as definitely locating the car at Montgomery street when Wolf had reached the west track, the inference which the defendant's counsel seek to establish from the testimony of this witness would seem to be deducible. The jury, however, who heard Price testify, may have observed that he did not give proper attention to that inquiry, and, if so, they had a right to compare and weigh his entire testimony, and were warranted in concluding that he intended to convey the idea that when he first saw the car it was about 200 feet from him, and therefore at least 36 feet nearer Wolf. If it were conceded that the car passed over 164 feet of track while Wolf was walking 13 feet and 8 inches, the car would necessarily have attained a velocity 12 times greater than that of the deceased, or 36 miles an hour, if he walked 3 miles in that time. Price's frequent use of the word "about," when employed to qualify the distance to which he referred, convinces us that he did not intend definitely to locate the position of the car at any particular time with reference to Wolf's movements. If the rate of speed which the car acquired as it ran heavily loaded down an incline was definitely known, and Wolf's relative position with reference to it certain at all times until he was injured, it might be possible to determine whether or not Price's testimony violated the laws of nature; but in the absence of such information we believe a fair construction of his sworn statements shows that they are not so improbable as to have warranted a declaration by the trial court, as a matter of law, that his testimony was unworthy of belief.

In Blumenthal *v.* Boston & Maine Railroad and in Stafford *v.*

Chippewa Valley Electric R. Co., *supra*, to which cases reference has hereinbefore been made, there was no conflict of testimony as to the rate of speed of the train and car respectively causing the injury, while in the case at bar that question is controverted. In order clearly to understand this branch of the subject, a statement of the defendant's theory of the cause and manner of the injury is deemed appropriate. No witness was called at the last trial by the defendant, but its counsel read to the jury the testimony given on behalf of their client at the prior hearing. This evidence is set out with some particularity in the former opinion (Wolf *v.* City Ry. Co., 45 Or. 446, 72 Pac. 329, 78 Pac. 668), and may be thus summarized: As the car was going north about 10 o'clock in the forenoon of August 26, 1902, which was a dry day, Wolf was seen crossing First street, at the south line of Mill, whereupon the motorman immediately rang the bell and applied the brakes, checking the speed of the car from 8 or 10 miles an hour to 3 or 4, during that period of time; that when Wolf reached the west track, where his view was unobstructed, he halted as if to permit the car to pass, and the motorman then released the brakes and the car started ahead, but when it was within about 7 or 8 feet south of the crossing Wolf suddenly attempted to pass in front of it, whereupon the brakes were firmly applied, but the motorman was unable to stop the car in time to prevent the accident, or until the front trucks had just passed over the north crossing of Mill street. C. F. Swigert, who was, and for several years prior to the accident had been, the manager of the defendant corporation, testified, as its witness, that he was acquainted with the practical working of an electric car and knew the manner of stopping one, and that, in his opinion, the shortest distance in which such a car could be stopped that was running at the rate of 6 miles an hour was 30 feet, at 8 miles an hour 40 feet, and at 10 miles an hour 50 feet. Joseph Friedman, as plaintiff's witness, testified that after striking Wolf the car was not stopped until its rear end was about two lengths of the car, or 56 feet, north of Mill street. Joseph Ruvensky, testifying for the plaintiff, said the car passed entirely across that street before it was stopped. Mrs. Alice Walker, as a witness for the same party, testified that the car was stopped below the crossing. Mrs. Mary Park, as the defendant's witness, testified that she was a passenger on the car at the time Wolf was injured, and on cross-examination, in referring to the place where the car was stopped after the accident, she stated, "I think it was about the middle of the block, or across over the crossing."

Assuming the fact most strongly against the plaintiff, that her husband was struck while he was at the extreme north line of the south cross-walk of Mill street, the car ran across the remainder of the highway, or 48 feet, and if Friedman's testimony is to be believed the front end of the car, which was the line of contact,

was not stopped until it had gone three times the length of the car, or 86 feet, below the crossing, thus making the entire distance, according to his estimate, 132 feet over which the car passed before it was stopped after causing the injury. If Mrs. Park's opinion is accepted, however, the intervening space over which the car passed after the accident, before it could be stopped by the motorman, who testified that he set the brakes as hard as he could, was 148 feet. As the speed of a car may reasonably be determined by the distance which it covers on the rails before it can be stopped, when the brakes are properly applied, and as the rate per hour is ascertained, as explained by Swigert, who is an expert in such matters, to be equivalent to one-fifth of such distance, the jury were authorized to infer from the testimony admitted that the car was running at the rate of 26.4 or 29.6 miles an hour when the injury occurred, and that in the management of the instrumentality the defendant's agents and servants were negligent. Marden *v.* Portsmouth, etc., Street Ry. Co., 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476; Chisholm *v.* Seattle Electric Co., 27 Wash. 237, 67 Pac. 601. Such deduction, when compared with Price's testimony, convinces us that no error was committed in submitting his sworn statements to the jury for their consideration. We are confirmed in this view by the testimony of Joseph Ruvensky, who, having stated that, at the time of the accident, he was on the west side of First street going north; that he heard the car back of him, and at the same time saw Wolf crossing the south side of that street, was asked, "When you first saw Mr. Wolf at that time, how far up the street were you on the west side?" and he replied, "I was about half a block." On cross-examination, the defendant's counsel, referring to Wolf, inquired, "How far was he from the curb on the west side when you first saw him?" and the witness answered, "The first time I saw him, he was at the first track, passing. * * * Q. How many steps did he take before the car came in sight? A. He was crossing. He was in the middle of the track, and crossing the tracks. Q. That is the position he was in when the car passed you? A. When the car passed me I did not see him. Q. You did not see the car pass you? A. I saw the car pass, but I did not see Mr. Wolf at that time. Q. How far was the car from the crossing when it passed you? A. The car was about three houses from the baker shop. Q. Then that was three houses above the baker shop, and the baker shop and another house on the corner, so that would make it about five houses. The car was about five houses away? A. Yes."

In referring to the testimony last quoted, the defendant's counsel make the following statement in their brief, to wit: "The usual width of houses is 16 feet, which would place him (Ruvensky) 80 feet from the corner, where he saw Wolf crossing the

track, when the car was so far behind him and up the street that he could not see it without looking around, nor did he see it until it afterwards passed him. Now, if the car was running at the rate of speed to which he testified, it must have been at least 30 feet further back, which would place the car not less than 100 feet from the crossing where Wolf was seen by Ruvensky in the act of crossing." No testimony was offered tending to show the width of the houses mentioned, nor did Ruvensky indicate the rate of speed which the car attained, except to state that it was going fast, and that it was about two seconds after it passed him before Wolf was struck by it. It is impossible accurately to determine from Ruvensky's testimony how far south of Mill street the car was when he first saw Wolf, or how far the witness was at that time from the street corner, except his estimate as to the latter distance, that it was about half a block, or 100 feet, and the car still further behind him. "A person about to cross a street at a regular crossing," says Mr. Justice Fell, in Callahan *v.* Philadelphia Traction Co., 184 Pa. 425, 39 Atl. 222, "is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross if it is run at the usual speed, it cannot be said as a matter of law that he is negligent in going on." So, too, in Philbin *v.* Denver City Tramway Co. (Colo.) 85 Pac. 630, Mr. Justice Maxwell, in speaking of the measure of care demanded from a traveler on a public highway, asserts: "It is not negligence per se for one to cross a street railway track in front of an approaching car, which he has seen and which is not dangerously near." If the jury believed the testimony of Ruvensky and of Price, they had the right to conclude that the approaching car was not dangerously near when Wolf attempted to cross the tracks in front of it, and they also had the right to find, from the testimony of plaintiff's witnesses, that the gong was not sounded, nor any effort put forth to check the speed of the car.

No ordinance limiting the rate of speed of a street car in Portland having been offered in evidence, nor any testimony produced tending to show what is the standard of legitimate speed for an electric car on First street in that city, Mr. Seabrook, of counsel for the defendant, called attention at the trial to the case of Yingst *v.* Lebanon, etc., Ry. Co., 167 Pa. 438, 31 Atl. 687, as establishing the rule governing the case at bar. In that case the plaintiff was injured by the upsetting of a wagon in which she was riding, occasioned exclusively by the fright of the horse which was drawing the vehicle. The negligence alleged was that the car was running at an excessive rate of speed, which caused the fright of the animal and thereby occasioned the injury. In rendering the decision, Mr. Justice Green, speaking for the court, in referring to the plaintiff's witnesses, says:

"Not one of them was even asked the question whether the speed of the car was greater than was allowable for an electric car to run, or whether they had any knowledge upon that subject. No experts in such matters were called to testify as to what would be a reasonably prudent rate of speed for such a car over such a street, and, in short, no evidence whatever was given upon that subject. Nor was any evidence given for the plaintiff as to the actual rate of speed at which this car was run, and therefore the plaintiff did not furnish any proof which could guide the jury in considering whether the defendant was guilty of any negligence in this regard." Further in the opinion it is observed: "Electric cars have a lawful right to go 'fast'—to go with 'speed.' The fact that they can do so is one of the great reasons of their being. When a witness says, therefore, in a given case, that the car ran swiftly or with speed, he says nothing to the purpose when the inquiry is as to negligence in the rate of travel. Such testimony is altogether too uncertain for judicial action, and most especially so when there was no collision, but only the fright of a passing horse." In Harkins *v.* Pittsburg, etc., Traction Co., 173 Pa. 149, 33 Atl. 1045, it was held that the rule thus announced was not applicable where a person was injured by being struck by a car. The court, referring to the legal principle invoked, say: "The circumstances of the two cases are not alike, and the degree of care required was not the same. In one case the speed of the car was wholly unimportant, except as it contributed to causes which produced an unexpected result, the fright of the horse; in the other, the rate of speed was of primary importance, as indicating the degree of control which the motorman exercised over the movements of the car in a crowded street, and when in a position demanding a high degree of care."

It is incumbent upon a street railway company, in operating its cars at public crossings, to use ordinary care to avoid injury; that is, such a degree of solicitude for the welfare of others as persons of average prudence would exercise, in view of the danger reasonably to be apprehended and of the consequences of accidents resulting therefrom. Excessive speed at such places augments the danger of collision with travelers, and, as it might reasonably have been inferred from the testimony produced at the trial that at the time of the accident the car causing the injury was running at a rate of 26 or 29 miles an hour, the court could not say, as a matter of law, that the speed was reasonable, and hence it was its duty to submit that question to the jury for their consideration. Davis *v.* Concord & Montreal Railroad, 68 N. H. 247, 44 Atl. 388. The rule thus announced is applicable in thickly populated or much-used districts, regardless of the fact whether or not a statute has been enacted or a municipal ordinance adopted limiting the rate of speed. Sundmaker *v.* Yazoo, etc., Ry. Co., 106 La. 111, 30 South. 285. Though the accident

occurred in the city of Portland, no testimony was offered tending to show the number of people who lived in the vicinity of First and Mill streets, or to estimate the persons who might reasonably be expected to cross the defendant's tracks at that intersection. It does appear, however, that at the time of the injury seven persons were on the street at or near the crossing, and from that number the jury had the right to infer that the highway was much used. In Golinvaux *v.* Burlington, etc., Ry. Co., 125 Iowa, 652, 101 N. W. 465, it was ruled that, in the absence of an ordinance regulating the rate of speed, a train running in the suburbs of a city across a street at the rate of 60 or 65 miles an hour was not of itself negligence, but was a circumstance to be submitted to the jury, with other evidence tending to show that the view of a traveler was obstructed at that crossing and that no bell was run. Whether or not such excessive velocity of a train in the outlying districts of a city is not per se negligence, even in the absence of a municipal ordinance regulating the rate of speed, need not now be considered; for the principles of law governing the management of trains propelled by steam power and regulating cars operated by electricity are not identical. Marden *v.* Portsmouth, etc., Street Ry. Co., 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476. In that case it was determined that the rule promulgated in Blumenthal *v.* Boston & Maine Railroad, 97 Me. 255, 54 Atl. 747, hereinbefore noted, was not applicable. We conclude, therefore, that the rule invoked is not appropriate to the case at bar, and that Wolf, when he attempted to cross the street, had the right to assume that the car, which was at such a reasonable distance, would permit him to do so, if run at the usual rate of speed (Hamilton *v.* Consolidated Traction Co., 201 Pa. 351, 50 Atl. 946); and hence no error was committed in refusing to instruct the jury to find for the defendant.

It is maintained by defendant's counsel that the judgment given is excessive, and for that reason an error was committed in refusing to set the verdict aside and to grant a new trial. In Lindsay *v.* Grande Ronde Lbr. Co. (Or.) 87 Pac. 145, it was ruled that the refusal of a trial court to set aside a verdict as excessive could not be reviewed on appeal, as the question presented was one of fact, and not of law.

Other errors are assigned; but, deeming them unimportant, the judgment is affirmed.

GIBSON *v.* IOWA CENTRAL RY. CO.

(Supreme Court of Iowa, Nov. 19, 1907.)

[113 N. W. Rep. 927.]

Railroads—Operation—Injuries to Animals—Fences.*—A railroad company is not liable for the killing of a mare trespassing upon its right of way in violation of a city ordinance, where both where the animal was killed and where it went upon the right of way the land was laid out in lots and blocks, and the right of way crossed by the various streets and alleys which were open to the public travel, since at such places a railroad has no right to fence its track.

Same—Questions of Law.—In an action for killing an animal on or near a railroad track, whether the defendant had a right to fence its right of way at the place where the animal was killed is a question of law for the court where the facts are undisputed.

Same—Verdict—Sufficiency of Evidence.—In an action for value of a mare alleged to have been killed by defendant railroad, evidence considered, and held insufficient to sustain a verdict for plaintiff.

Same—Burden of Proof.†—In an action for the alleged killing of an animal on or near a railroad track, where the animal was a trespasser, the burden is on the plaintiff to show that the animal was killed by a passing train, and that the killing was negligent.

Same—Circumstantial Evidence—Sufficiency.—Where, in an action for the negligent killing of an animal, the evidence is circumstantial, the circumstances shown must negative every other hypothesis, save that of defendant's negligence.

*For the authorities in this series on the subject of the care required of those in charge of trains or street cars while running them within cities and towns, to avoid injuring domestic animals, see Little Rock Ry. & Elec. Co. *v.* Newman (Ark.), 20 R. R. R. 631, 43 Am. & Eng. R. Cas., N. S., 631 (hog killed by street car); St. Louis, etc., Ry. Co. *v.* Kimberlain (Ark.), 16 R. R. R. 479, 39 Am. & Eng. R. Cas., N. S., 479 (duty of engineer, while passing through town, to be on the alert, and prepared for instant action, in case stock stray upon the track); Borneman *v.* Chicago, etc., Ry. Co. (S. Dak.), 16 R. R. R. 464, 39 Am. & Eng. R. Cas., N. S., 464 (violation of speed ordinance, act proper for consideration of jury in determining whether defendant was negligent); Anniston Elec. & Gas. Co. *v.* Hewitt (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312 (duty of motormen with respect to lookouts and speed); Evans *v.* Sherman, S. & S. Ry. Co. (Tex.), 5 Am. & Eng. R. Cas., N. S., 184; Ford *v.* St. Louis, etc., Ry. Co. (Ark.), 15 Am. & Eng. R. Cas., N. S., 142 (negligence in running train against cow was question for jury); note, 12 R. R. R. 197, 35 Am. & Eng. R. Cas., N. S., 197 (*lookout* duty); note, 5 Am. & Eng. R. Cas., N. S., 186, et seq.

†See second foot-notes appended to Martin *v.* Chicago, etc., Ry. Co. (Wyo.), 23 R. R. R. 306, 46 Am. & Eng. R. Cas., N. S., 306.

Gibson *v.* Iowa Central Ry. Co

Appeal from District Court, Cerro Gordo County; Clifford P. Smith, Judge.

Action at law to recover the value of a mare killed upon or near defendant's right of way in the city of Mason Ctiy. Trial to a jury, verdict for plaintiff, which was set aside upon defendant's motion for a new trial, and plaintiff appeals. Affirmed.

Glass, McConlogue & Witwer, for appellant.

John I. Dille, Geo. C. True, and *Blythe, Markley, Rule & Smith,* for appellee.

DEEMER, J. Plaintiff's petition is in two counts. In the first he asked recovery upon the ground that his animal was killed upon defendant's right of way at a place where it had the right to fence, and in the second he sought to hold defendant liable for the negligence of its employees in charge of the train which killed the animal. At the conclusion of the testimony, the trial court, upon motion, directed a verdict for defendant upon the first count, or refused to submit the same to the jury. The second count was submitted, and a verdict was returned for plaintiff, which was afterward set aside in defendant's motion for a new trial, upon the ground that there was no testimony showing that defendant's employees saw the mare in time to have prevented the accident. The evidence shows that plaintiff's mare was kept in a barn upon the fair grounds near Mason City, Iowa, in charge of one Swift. On the evening of January 21, 1906, the barns took fire, and the horses were gotton out as quickly as possible, and some of them, including plaintiff's mare, were permitted to escape. The next morning plaintiff's animal was found dead near the south abutment of a viaduct on defendant's right of way, crossing what is know as "Superior street" or "Merril avenue," in the city of Mason City. There was evidence tending to show that the mare had followed defendant's right of way from the north for some distance until she reached the viaduct, when she was either struck by a train and thrown into the street below or where she fell from the embankment into the street, receiving injuries from which she died. All the evidence tended to show that the animal went upon the track within the city limits and within that portion thereof which was platted, and through which ran various streets and alleys, and, in so far as the case rests upon the first count of the petition, the sole question is: Did the mare go upon the track, or was she killed at a place where defendant had a right to fence?

It is conceded that at neither place did defendant maintain a fence. This, of course, it was not required to do; but, if the accident occurred at a place where defendant had a right to fence and by reason of the want of such fence, then defendant is liable on the first count of its petition. Code, § 2055, and cases cited. That these places were both within the city limits

is not controlling, but, if at such place within the boundaries of the city as was platted into lots and blocks and was intersected with streets and alleys, the railway company had no right to fence, and is not responsible for stock killed by reason of the want of fences along its right of way. Blanford *v.* Railroad, 71 Iowa, 310, 32 N. W. 357, 60 Am. Rep. 795; Rogers *v.* Railroad, 26 Iowa, 558; Coyle *v.* Railroad, 62 Iowa, 518, 17 N. W. 771. It is not important that the lots and blocks are irregular in shape or variant in size; nor is the mere fact that the streets and alleys were not used or open to the public travel controlling. Lathrop *v.* Railroad, 69 Iowa, 105, 28 N. W. 465; Long *v.* Railroad, 64 Iowa, 657, 21 N. W. 122. Whether or not the place was one where defendant had a right to fence is a question of law for the court, and not ordinarily under undisputed facts of fact for a jury. Blanford *v.* Railroad, 71 Iowa, 310, 32 N. W. 357, 60 Am. Rep. 795. Now, the evidence shows without dispute that both at the place where the animal was killed and where it went upon the right of way, and for some distance north of these points, the land was laid out in lots and blocks, and the right of way was crossed by various platted streets and alleys which were open to public travel, and under the rules announced in the cases hitherto cited the defendant had no right to fence at these places. None of the cases cited and relied upon by appellant are in point or controlling upon this proposition. There may be cases where stock is killed within the limits of a town or city which present a question of fact for a jury to determine whether or not the stock entered upon the track at a place where the railway company had a right to fence; but where, as here, there is no dispute in the testimony and the physical condition is not in dispute, the question is one of law for the court. This case is clearly ruled by Blanford's Case, *supra*, and the trial court was right in taking the first count of the petition from the jury.

2. If the animal was struck or killed by a passing train, it was either a freight or a passenger one, for but these passed the place where the animal was found at such a time as that it might have been struck by a train. There was an ordinance of the city prohibiting stock from running at large, and the animal was a trespasser upon defendant's right of way. These being the facts, defendant's employees were under no obligation to keep a lookout for animals which might be upon the track. Liability may be predicated only upon the proposition that defendant's employees saw the animal upon the track at such a time as that in the exercise of ordinary care they might have stopped the train in time to have avoided injury. The burden was upon plaintiff to show, not only that his mare was killed by a passing train, but that this killing was due to the negligence of defendant's employees. It is not enough for him to show that this might

perhaps have been the cause of the injury. His case, so far as the second count of the petition is concerned, rests wholly upon circumstantial evidence, and the rules applicable thereto are well understood. The circumstances shown must negative every other reasonable hypothesis, save that of defendant's negligence. Verdicts should not be based upon mere theory or supposition. Asbach *v.* Railroad, 74 Iowa, 248, 37 N. W. 182; O'Connor *v.* Railroad, 129 Iowa, 636, 106 N. W. 161; Rhines *v.* Railroad, 75 Iowa, 597, 39 N. W. 912; Neal *v.* Railroad, 129 Iowa, 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905. In order to find a verdict for plaintiff on the second count of the petition, it was necessary not only for the jury to infer that the animal was killed by a passing train, of which there was no direct evidence, but also that the animal was in plain sight upon the track a sufficient length of time for the defendant's employees to have seen her if they had been looking and to have stopped their train; that they were, in fact, looking, which they were not required to do, and that they, in fact, saw the animal a sufficient length of time before they struck her to have, in the use of ordinary care and diligence, avoided the injury. This would be piling inference upon inference to an extent not permitted by the law. There was not in our opinion sufficient evidence to justify a verdict upon the second count of the petition, and the trial court was right in setting it aside.

No error appears, and the judgment must be, and it is, affirmed.

LOUISVILLE & N. R. CO. *v.* TAYLOR'S ADM'R.

(Court of Appeals of Kentucky, Oct. 18, 1907.)

[104 S. W. Rep. 776.]

Appeal—Reservation of Grounds of Review—Exceptions—Instructions and Refusal of Instructions.—Where no exception was taken to the action of the court in giving or refusing instructions, their propriety cannot be considered on appeal, even though certain instructions given had been objected to.

Railroads—Accidents at Crossings—Contributory Negligence—Question for Jury.—Where the ordinary signals of the approach of a train to a crossing are not given and a lookout is not maintained, the question of contributory negligence will ordinarily be left to the jury.

Same.—Where plaintiff's intestate had driven close to the track before learning of the approach of a train to a crossing, no signal having been given by the train, whether he acted with ordinary care in attempting to cross, instead of turning back, held a question for the jury.

Same—Injury Avoidable Notwithstanding Contributory Negligence.*—In going over a railroad crossing, if one fails to exercise ordinary care for his own safety, either from misapprehension, inadvertence, or mistake, he does not thereby become a trespasser or forfeit the protection which the law throws around human life, and the company will be liable if injury might have been averted by the exercise of ordinary care, notwithstanding the contributory negligence of the person injured.

Same—Care of Trainmen—Lookouts.†—The law requires that those in charge of a train shall give adequate notice of its approach to crossings, and exercise ordinary care by maintaining a lookout for the safety of persons thereon.

Same—Contributory Negligence—Care in Going on Track.‡—The law requires the traveler over a railway crossing to exercise ordinary care to learn of the coming of trains and keep out of their way.

Same—Rate of Speed.—The speed of railway trains should be moderated in cities and towns where the presence of persons on the track in the street of the town or at crossings must be anticipated.

Same—Actions for Injuries—Questions for Jury.—In an action against a railway company for killing plaintiff's intestate at a railway crossing, evidence considered, and held sufficient to go to the jury.

Same—Admission of Evidence—Custom of Deceased.§—In an action for the negligent killing of plaintiff's intestate at a railway crossing, evidence that the deceased was by custom reckless in driving across the railroad is not admissible.

Same—Customary Rate of Freight Train.§—In an action for the

*For the authorities in this series on the subject of the combined effect of negligence and contributory negligence in actions for injuries sustained at railroad crossings, see foot-notes appended to Baker *v.* Tacoma Eastern Ry. Co. (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.

†For the authorities in this series on the subject of the duty to maintain lookouts upon trains approaching crossings, see foot-notes appended to Cooper *v.* North Carolina R. Co. (N. Car.), 19 R. R. R. 857, 42 Am. & Eng. R. Cas., N. S., 857.

‡For the authorities in this series on the question of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-notes appended to MacFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to Louisville & N. R. Co. *v.* Lucas' Adm'r (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739; foot-notes appended to Bamberg *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; foot-notes appended to Norris *v.* New York, etc., R. Co. (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.

§See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296; MacFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; Greer *v.* Union St. Ry. Co. (Mass.), 22 R. R. R. 240, 45 Am. & Eng. R. Cas., N. S., 240; Yazoo, etc., R. Co. *v.* Byrd (Miss.), 22 R. R. R. 196, 45 Am. & Eng. R. Cas., N. S., 196.

negligent killing of plaintiff's intestate at a railway crossing, evidence that the train was not exceeding the usual rate of freight trains through the town is not admissible.

Same—Rate of Speed—Justification.—The fact that by running through a town at a high rate of speed would render it easier to ascend a grade just beyond will not justify a railway company in running its trains through the town so as to imperil human life unnecessarily.

Witnesses—Cross-Examination as to Writings.—Written rules of a railway company should be produced before allowing cross-examination of the company's witnesses as to their contents.

Appeal from Circuit Court, Rockcastle County.
"Not to be officially reported."

Action by James Taylor's administrator against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Benjamin D. Warfield, J. W. Alcorn, and *J. W. Brown,* for appellant.

Robert Harding, C. C. Williams, and *Greene & Van Winkle,* for appellee.

HOBSON, J. James Taylor, a boy 13 years old, while driving a delivery wagon over the Main street crossing of the Louisville & Nashville railroad track, in Mt. Vernon, Ky., was struck and killed by a north-bound freight train. This action was brought to recover for his death under the statute. A verdict and judgment were rendered in the circuit court for $10,000 in favor of the plaintiff, and the defendant appeals. The defendant asked on the trial two instructions, which the court refused to give. The court gave the jury four instructions asked by the plaintiff, to which the defendant objected, but the defendant did not except to the action of the court in refusing to give the instructions asked by it, or in giving the instructions asked by the plaintiff. There being no exception by the defendant to the action of the court, the propriety of the instructions cannot be questioned on the appeal. L. & N. R. R. *v.* Bowcock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, and cases cited.

It is insisted, however, that the court erred in refusing to instruct the jury peremptorily to find for the defendant under the evidence, that the verdict is palpably against the evidence, and that the court erred in the admission and rejection of evidence. Mt. Vernon is a town of 600 or 800 people lying about equally on either side of the railroad track, to the south of Main street, and one square from it another street crosses the railroad track. The Main street crossing is one very much used; from 400 to 1,000 people crossing there daily. The main hotel of the town is only a short distance from the crossing, the post office is only 50 or

60 feet from it, and six public roads leading into the town lead to this crossing. The proof for the plaintiff was to the effect that the train was running about 30 or 35 miles an hour; that the engineer as he passed the station was looking at some one at the station and waving to him and that he continued to do this until he was nearly upon the crossing; that the boy was driving his wagon along the street in a walk or jog trot; and that the statutory signals of the approach of the train to the crossing were not given. There was another boy in the wagon who was standing up behind the seat, or sitting upon it with his head turned the other way. This boy saw the approaching train just as they reached the track, and jumped from the wagon. He struck the ground between the main track and the side track. The center of the side track is 14 feet from the center of the main track. Taylor remained in the wagon, and undertook to whip up his horse with the lines. The horse cleared the track, but the wagon was struck by the train before it cleared the track, and Taylor was killed by the train. The view as one approached the track was obstructed so that the train could not be seen by the boys until they got within about 30 feet of the track, but neither of them evidently did see it until they got within about 15 feet of the track.

It is earnestly insisted that Taylor neither stopped, looked, nor listened, and the proof for the plaintiff clearly showed that he was guilty of contributory negligence. Still he cannot testify for himself. He had the right to assume that the ordinary signals of the approach of the train to the crossing would be given; and, when this is not done and a lookout is not maintained, the rule is that the question of contributory negligence will ordinarily be left to the jury. L. C. & L. R. R. *v.* Goetz' Adm'x, 79 Ky. 442, 42 Am. Rep. 227; L. & N. R. R. *v.* Clark's Adm'r, 105 Ky. 571, 49 S. W. 323. It is evident that, when Taylor's attention was called by his companion to the approaching train, he was very close to the track. Whether he should then have turned his horse or gone forward was a question he had to determine on the instant. The rule is that, where a person has been placed in a position of peril by the negligence of another, he may recover for his injury although he may not, as shown by subsequent events, adopt the safest course, provided he uses such care and judgment as might be fairly expected of a person of ordinary prudence under the circumstances. In view of the fact that Taylor was so close to the track when he learned of the approach of the train, it was a question for the jury whether he acted with ordinary care in following the course he then pursued. L. & N. R. R. Co. *v.* Molloy's Adm'r, 91 S. W. 685, 28 Ky. Law Rep. 1113. This court has time and again declined to adopt the rule which imposes all the care on the traveler and none on the railroad company at highway crossings. If the traveler on the highway fails to use ordinary care for his own safety either from misapprehension,

inadvertence, or mistake, he does not thereby become a trespasser or forfeit that protection which the law throws around human life. In such a case he may not recover for his injury unless after his peril was discovered, or by ordinary care should have been discovered by those in charge of the train, the injury to him might, by ordinary care, have been averted. The law requires that those in charge of the train shall give adequate notice of its approach to the crossing, and exercise ordinary care by maintaining a lookout for the safety of persons on the crossing. It requires of the traveler over the crossing to exercise ordinary care to learn of the coming of the train and keep out of its way. The sacredness of human life requires that the duty thus imposed upon both parties should not be relaxed, and that the railroad company should not be allowed with impunity to sacrifice human life by the dangerous instrumentalities used by it when this might have been avoided had it exercised proper care. A rapidly moving train is a source of deadly peril to the travelers on the highway, and those who use a thing of so much danger to human life cannot be acquitted of responsibility, although the person injured failed to use ordinary care for his own safety, if notwithstanding this the injury might have been averted by proper care on their part. In the case at bar if proper notice of the approach of the train had been given, or if the engineer had been maintaining a lookout, or if the wagon had had another second to clear the track, the death of the intestate might have been avoided.

The proof for the defendant showed that the bell of the train was ringing as the train approached the crossing, and that the train was not running more than 15 or 16 miles an hour. It also showed that the whistle was blown a number of times as the train approached the station, and that these signals were heard by persons in different parts of the town; but there were buildings between Taylor and the train, and this may account for the fact that neither he nor his friend noticed the whistle. It has been held by this court that the speed of railroad trains should be moderated in cities and towns where the presence of persons on the track in the street of the town or at crossings must be anticipated, and that to run a railroad train through such a town at a great rate of speed is evidence of negligence. Illinois Central R. R. *v.* Murphy's Adm'r, 97 S. W. 720, 30 Ky. Law Rep. 93; Rader's Administratrix *v.* L. & N. R. R. (decided October 16, 1907) 104 S. W. 774. Under these authorities, the court properly refused to instruct the jury peremptorily to find for the defendant, and the verdict is not so palpably against the evidence as to warrant us in disturbing it on this ground.

The defendant offered to prove that Taylor was by custom reckless in driving across the railroad, and that he had on several previous occasions come very near being hit by the train. This evidence was properly rejected. In a civil action neither side

can give in evidence what the custom or practice of either of the parties is. The question is not what they were accustomed to do, but what they did at the time in controversy. The plaintiff could not prove that the defendant was by custom negligent in running its trains over this crossing, or that he was always very careful in driving over it. L. & N. R. R. Co. *v.* Berry, 88 Ky. 225, 10 S. W. 472, 21 Am. St. Rep. 329; L. & N. R. R. Co. *v.* Chism, 47 S. W. 251, 20 Ky. Law. Rep. 384; 1 Wharton on Evidence, § 29. For the same reason, it was improper for the defendant to show that the train in controversy was running no faster than its freight trains usually ran through the town. It could acquire by prescription no right to run its train through the town at a dangerous rate of speed; and, if this train was running at a dangerous rate of speed, it was no less responsible for it if on other days other trains were run by it through the town just as rapidly. The evidence, if admitted, would have proved nothing material to the case. It is manifest that a train loaded like this could stop at the station and then pull up the grade; but it would be harder for it to do so. The fact that it would be easier to get the train up the grade by running through the town at a high rate of speed is not sufficient to justify the railroad in so running its trains through the town as to imperil human life unnecessarily.

Complaint is also made that appellant's witnesses were allowed to be cross-examined as to certain rules of the company where the rules were not produced. Regularly the written rules should always be produced before any testimony is allowed as to their contents; but in this case what was admitted about the rules bore so remotely upon the issue which the jury were to try that we do not see that the substantial rights of the appellant were prejudiced. At least, the ends of justice do not require the granting of a new trial for this reason. The witnesses had been introduced by appellant to show that the train was not running over 15 or 16 miles an hour, and that the proper signals of the approach of the train to the crossing were given. What they testified to in regard to the rules was only as to collateral matters.

Judgment affirmed.

CHICAGO & N. W. RY. CO. v. O'BRIEN.

(Circuit Court of Appeals, Eighth Circuit, March 30, 1907.)

[153 Fed. Rep. 511.]

Railroads—Injuries to Licensee—Speed—Negligence.*—In general, in the absence of a regulating statute or ordinance, a carrier may run its trains at such a rate of speed as it deems convenient for the conduct of its business, without being guilty of negligence per se in case a derailment occurs resulting in injuries to licensees on the train.

Same—Question for Jury.*—Where defendant railroad company operated a fast mail train down a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve at the foot of the grade, at the rate of from 70 to 75 miles per hour, without slackening speed, and the train was derailed at the curve, resulting in the death of plaintiff's intestate, an express messenger working on the train, whether defendant was guilty of negligence was for the jury.

Writ of Error—Excessiveness of Damages—Review.—The Circuit Court of Appeals has no jurisdiction to review an objection that the damages awarded in an action for wrongful death are excessive, though it is convinced that the trial court improperly exercised its discretion in refusing to grant defendant relief on such ground on the motion for a new trial.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Error to review a judgment obtained by Mary O'Brien, as administratrix of the estate of J. J. O'Brien, deceased, against the Chicago & Northwestern Railway Company.

D. E. Lyon (*Lyon & Lyon*, on the brief), for plaintiff in error.

R. M. Wright (*Wright & Nugent* and *Healy & Healy*, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This is the second appearance of this case in this court. When it was first here, a judgment in favor of the plaintiff was reversed because the trial court refused to instruct the jury that negligence could not be inferred from the fact of accident in an action for the death of one who was not a passenger, but whose relation to the defendant was analogous to that of an employee and governed by the same principles. Also

*For the authorities in this series on the question whether railway postal clerks are passengers, see foot-notes appended to Decker v. Chicago, etc., Ry. Co. (Minn.), 24 R. R. R. 587, 47 Am. & Eng. R. Cas., N. S., 587.

it was doubted that there was sufficient evidence that the derailment of the train which resulted in the death of the deceased was due to the negligence of the defendant. The general features of the case fully appear in the report of our previous opinion. Railway Co. *v.* O'Brien, 67 C. C. A. 421, 132 Fed. 593.

At the second trial additional evidence of a dangerous rate of speed, in connection with the particular structure of the track at and in the vicinity of the place of wreck, was introduced, and the plaintiff again secured a verdict and judgment. The exceptions preserved at the trial and such of the assignments of error as were framed and set forth in the brief of counsel in the manner required by the rules of this court present but one question that requires our consideration: Did the trial court err in refusing the defendant's request for a directed verdict in its favor? In other words, was there sufficient evidence of the negligence of the defendant to require the submission of the case to the jury?

The train upon which the plaintiff's intestate was engaged as an express messenger and the wreck of which resulted in his death was a fast mail train running between Chicago and Omaha. Its schedule called for a speed of 45 miles per hour, though it does not follow that that speed was to be maintained over every portion of the track. The train was derailed a short distance west of Boone, Iowa, at the foot of a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve. There were but three curves as sharp on defendant's system in Iowa comprising more than 1,000 miles of railroad track, and it was the sharpest curve between Boone and the Missouri river. All other charges of negligence failing for lack of proof, the only claim left the plaintiff was that the accident was caused by a negligent rate of speed at which the train was being run by the engineer, considering the grade and the sharp curve at the bottom. Upon this question there was the following testimony for the plaintiff supplementing a description of the track and grade:

Lindell was a railway mail clerk upon the wrecked train. He had made the particular run about 60 times. For some minutes before the accident he was looking out of the side door of his car and observing the telegraph poles and other fixed objects along the right of way. After qualifying himself to testify upon the subject of speed, he said that the train was running from 70 to 75 miles per hour.

Sigafoos was an express messenger working in the express car under the directions of the deceased. He said that the train was going so fast over the curves near the point of derailment and the car was swaying so violently that nearly all of the piles of express packages were thrown down.

Dye showed his familiarity with railroad operations by testifying that he had been a railway telegrapher for about eight years. He saw the accident from a point half a mile distant, and said

that the engine was working steam in going down the hill, a thing which he had never observed before upon any of the 15 to 30 other occasions when he saw the train at that place. The noise of escaping steam and the unusual speed attracted his attention.

Hoyt, a railway mail clerk of seven years' experience, had served upon this fast mail train for a year, and in going eastward and westward had passed over the track where the derailment occurred about every three days. On the occasion in question, and shortly before the accident, the letters were thrown from their pigeon holes at the side of the car by the violent lurching of the train. This was an unusual occurrence. He did not recall that it had ever happened before. The pigeon holes from which the letters were thrown were about seven inches in depth, with a downward slant of about an inch. He had difficulty in keeping his feet, and the clerks were tossed from side to side of the car. The train seemed to be going at a greater rate of speed than usual. He also said that he did not notice that the air brakes were applied, although if they had been the effect would have been noticeable.

Fox, a locomotive engineer with over 30 years' experience, said that a speed of 60 miles per hour down such a grade and upon such a curve would be unsafe, and the danger would be enhanced with the increase of the speed; also that the application of the brakes steadies a train when taking a curve at speed.

Dowd, a locomotive engineer, said that the purpose of applying brakes on a sharp curve is to steady the train. The testimony of Nettle and Johnson was to the same effect.

Bowles, an eyewitness who testified at the first trial, again said that the train was running with unusual speed, nearly twice as fast as on former occasions, and that, while previously this train slowed up at the descent, it did not do so at this time.

The rapid movement of trains in the carriage of freight and passengers and the mails, resulting from the insistent demands of the public and the necessities of commerce, has become a feature of our modern life, and the enterprise of the times finds expression in the train schedules of the carriers. A complete observance of these schedules, which would imply perfection in mechanism and human skill, is impossible in the practical operation of a railroad. Moreover, conditions constantly arise which as often require that some trains be rushed forward at increased speed as that others be held back in order that the business of transportation may not be unduly impeded and the engagements of the carrier be measurably fulfilled. All of this signifies risk to life and limb of those who serve upon the train; but, if the company has been duly diligent in respect of operation, appliances, and ways, the risk is one that is assumed, and there is no recourse for a resulting injury. And so the general rule is that, in the absence of a regulating statute or ordinance, a railroad com-

pany is at liberty to run its trains at such speed as it deems convenient for the conduct of its business, and a high rate of speed is not, per se, negligence. But this rule has its limitations. For instance, there may be at particular points upon its railroad such defects in the track or such conditions of structure, though not defective, as to make the rate of speed at which a train is moving an element to be considered in determining the question of negligence. Railroad *v.* Bishard (C. C. A.) 147 Fed. 496, was a case of that character. A train moving at high speed was wrecked by being shunted to a siding constructed and designed for trains moving slowly or under control. See, also, Meloy *v.* Railway, 77 Iowa, 743, 42 N. W. 563, 4 L. R. A. 287, 14 Am. St. Rep. 325. There is an analogy in passenger cases, though the rules governing liability are different. Railway *v.* Lewis, 145 Ill. 67, 33 N. E. 960. In Railway Co. *v.* Clowes, 93 Va. 189, 24 S. E. 833, the court, after observing that as matter of law mere rate of speed, though unusual, is not negligence, said:

"Without doubt a rate of speed may be dangerous, taken in connection with other circumstances; as, for instance, the condition of the track, which would be entirely safe under other circumstances. The degree of curvature may be such as to render more than a given rate of speed dangerous, and a dangerous rate of speed is negligence."

The evidence in this case on behalf of the plaintiff, the substance of which has been given, is harmonious and of a substantial character, and in our opinion it is sufficient, being believed by the jury as against the countervailing evidence, to support the conclusion that the train was being negligently operated by the engineer in view of the unusual and excessive speed, the descending grade, and the sharp curve at the bottom, A statute of Iowa permits a recovery, although the deceased and the engineer were fellow servants.

Complaint is made of the amount of damages awarded. The attention of the trial court was directed to this matter by a motion for a new trial, which was overruled. We agree with counsel that the award is excessive, and that the defendant has been thereby deprived of its property to that extent; but it has been conclusively settled that the sole remedy for such a grievance is by appeal to the judgment and discretion of the trial court. Its refusal to act is final.

The judgment is affirmed.

CHESAPEAKE & O. RY. CO. *v.* WILSON'S ADM'R.

(Court of Appeals of Kentucky, June 5, 1907.)

[102 S. W. Rep. 810.]

Railroads—Injuries at Crossings—Actions—Evidence.—In an action for the death of plaintiff's intestate at a private railway crossing, where several persons testified that the whistle was not sounded when the train approached a public crossing near the private one, it was not error to exclude the evidence of the engineer and fireman that they thought it was sounded, where they admitted that they did not remember about it.

Same—Contributory Negligence.*—Where plaintiff's intestate was injured at a railway crossing, recovery is not barred unless she failed to exercise such care as an ordinarily prudent person would exercise under similar circumstances.

Same—Obstruction at Crossings—Actions—Instructions.—In an action for injuries to plaintiff's intestate received at a railway crossing, where it was shown that a pile of dirt obstructed the view of the tracks from the crossing, it was not error to refuse to instruct that it was the duty of intestate to exercise care commensurate with the increased danger, where it had already instructed that it was her duty to look and listen before going upon the track.

Same—Negligence of Engineer.†—Where plaintiff's intestate was killed at a railway crossing, and there was evidence that the engineer by the exercise of ordinary care could have seen her, and should have known that she was going upon the track unaware of the ap-

*For the authorities in this series on the subject of the care required of a highway traveler before making an attempt to cross railway tracks, see foot-notes appended to Louisville & N. R. Co. *v.* Lucas' Adm'r (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739; foot-notes appended to Ramberg *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; foot-notes appended to Norris *v.* New York, etc., R. Co. (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.

For the authorities in this series on the question of the degree of care required of a person for his own protection, see foot-notes appended to Wilson *v.* Southern Ry. (S. Car.), 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548; foot-notes appended to Cole *v.* Blue Ridge Ry. Co. (S. Car.), 21 R. R. R. 606, 44 Am. & Eng. R. Cas., N. S., 606; foot-notes appended to Alabama Great Southern R. Co. *v.* Fulton (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311.

†See foot-notes appended to Louisville & N. R. Co. *v.* Vanarsdell's Adm'r (Ky.), 10 R. R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1; Rawitzer *v.* St. Paul City Ry. Co. (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91.

For the authorities in this series on the subject of the duty to maintain lookouts upon trains approaching crossings, see foot-notes appended to Cooper *v.* North Carolina R. Co. (N. Car.), 19 R. R. R. 856, 42 Am. & Eng. R. Cas., N. S., 856.

proach of the train in time to have avoided striking her, it was proper to instruct that the defendant was liable if its engineer saw intestate approaching the track without looking for the train in time to have prevented striking her.

Same—Signals—Private Crossings.‡—Where the persons using a private crossing could plainly hear the signals required for a public crossing, and relied upon them for warning of an approaching train, the railway company is liable for injuries at the private crossing resulting from its failure to give proper signals at the public crossing, though a mile distant.

Appeal from Circuit Court, Lewis County.
"Not to be officially reported."

Action by Nancy J. Wilson's administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Wardsworth, Le Wright Browning, and *Worthington & Cochran,* for appellant.
Allan D. Cole, Thos. B. Phister, and *R. D. Wilson,* for appellee.

CARROLL, J. This is the second appeal of this case. The opinion heretofore delivered may be found in 86 S. W. 690, 27 Ky. Law Rep. 778. As the facts are there fully and correctly stated, we will not repeat them. A reversal is asked because of alleged error in granting and refusing instructions, and excluding competent evidence.

The engineer and fireman were asked whether the whistle was sounded for the road crossing west of the private crossing at which appellee was killed by a fast passenger train going east. They each answered that they did not remember whether it was or not. Each was then asked: "Have you any judgment about what you did that day?" To this question objection was sustained, and an avowal made that each witness, if he was permitted to answer, would say that it was the custom of the engineer to whistle, and they were satisfied that he performed his duty, although they had no recollection of it at the time they testified. In view of the fact that both the engineer and fireman stated positively that they did not remember whether the whistle was sounded or not, it cannot be said that it was error to refuse to permit an expression of opinion on the subject. If the engineer and fireman had no recollection whatever about the matter, their opinion that the whistle was sounded would be of little value; and, even had they been permitted to express an opinion concerning it, it is fair to assume that the result of the trial would not have been affected. A number of witnesses testified positively

‡See foot-notes appended to Norfolk & W. Ry. Co. v. Gesswine (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553.

that the whistle was not sounded, and appellant could not have been prejudiced by the failure to permit these employees to express an opinion touching a matter about which neither of them had any knowledge.

The jury were instructed, in substance, that it was the duty of the agents in charge of the train that killed decedent to sound the whistle or ring the bell on approaching the public crossing, and, if they believed from the evidence that it was customary for the deceased when using the private crossing to and she did rely upon the signals given for the public crossing, and further believe that the whistle was not sounded or the bell rung, and by reason of the failure in this respect deceased, while exercising ordinary care for her own safety, was struck and killed, they should find for the plaintiff. They were further told that it was the duty of the deceased in approaching the crossing where she was killed to look along the track in both directions for trains that might be approaching before starting to go across the railroad, and it was also her duty to listen for approaching trains before attempting to cross, and, if they believed that by looking and listening she would have been warned of the approach of the train in time to have avoided coming in collision with it, they should find for the company; although they might believe its employees were guilty of negligence, unless they further believed that the engineer saw in time to have prevented striking her that decedent was approaching the track without either looking or listening or being aware of the approach of the train; also that if the company undertook to maintain the private crossing and negligently allowed a pile of dirt to accumulate on one side thereof, which obstructed the view of decedent while attempting to use the crossing to such an extent that she could not by the exercise of ordinary care observe an approaching train, and that by reason of such negligence she was struck and killed, they should find for the plaintiff. The instruction imposing upon the decedent the duty of looking and listening for the approach of a train before she attempted to cross the track was more favorable to appellant than the law authorizes. It is not and never has been the rule in this state that persons rightfully using crossings must either stop or look or listen for the approach of trains. The only duty imposed upon them is to exercise ordinary care—that is, such care as an ordinarily prudent person would exercise under like conditions and similar circumstances—and the jury were informed that there could be no recovery for appellee unless the deceased exercised this degree of care.

Counsel for appellant concede that the court properly instructed the jury in respect to the negligence of the company in permitting a pile of dirt to remain and obstruct a view of the railroad from the crossing, but insist that the court should also have instructed the jury that, if this pile of dirt prevented the decedent from

seeing an approaching train, then it was her duty on that account to exercise greater care in going on or across the track, and such care as was commensurate with the increased danger. The court did more than it was asked to do by this instruction, as it imposed on plaintiff, not only the duty of exercising great care, but required that she must look and listen. So that, in view of the instruction given by the court, appellant cannot justly insist that it was prejudiced by the failure to give the one asked.

Complaint is made that it was error to qualify the instruction as to contributory neglect by making the company liable if the engineer saw decedent approaching the track without looking for the train in time to have prevented striking her. There was evidence that, when decedent emerged from behind the pile of dirt, which was only a few feet from the track, the engineer by the exercise of ordinary care could have seen her, and should have known that she was going upon the track unaware of the approach of the train in time to have avoided striking her. In view of this evidence, it was competent to submit this question to the jury, as if the persons in charge of the train discovered the imminent peril in which the deceased was placed, it was their duty to exercise ordinary care to prevent the injury.

The road crossing for which it was the duty of appellant's agents to sound the whistle and ring the bell was a mile from the private crossing, and it is argued that the distance is too great to entitle persons at the private crossing to rely on the signals given for the public crossing. There is no doubt that signals given at the public crossing could be plainly heard at the private crossing, and that persons using the private crossing relied upon them, and, this being true, it is not important that the distance between them was a mile; the material inquiry being, did persons using the private crossing rely on the signals for the public crossing and could they be plainly heard? When these two conditions concur, and the company is remiss in its duty, it becomes liable in damages to persons using the private crossing who are injured by its negligence. Cahill *v.* Cincinnati R. Co., 92 Ky. 345, 18 S. W. 2.

The facts in the case of Louisville & Nashville R. Co. *v.* Survant, 44 S. W. 88, 19 Ky. Law Rep. 1576, relied on by appellant, are so different from those here presented that the conclusions arrived at in that case are not at all applicable to this.

Perceiving no error, the judgment is affirmed.

FIREMAN'S FUND INS. CO. *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Washington, July 26, 1907.)

[91 Pac. Rep. 13.]

Railroads—Fires—Action—Evidence—Sufficiency.—Evidence in an action against a railway company for loss caused by a fire escaping from the right of way held to sustain a verdict for plaintiff.

Same—Instruction.—In an action against a railway company for loss caused by a fire escaping from its right of way, an instruction that, if the jury should not find that the company through its officers or agents caused the fire, defendant should recover, was not objectionable as making the company liable, though it exercised reasonable care, where the other instructions, clearly made reasonable care a test of the company's liability.

Appeal—Review—Estoppel to Assert Error.—Where, in an action against a railway company for a loss caused by a fire escaping from its highway, the matter of negligence in the use of defective appliances was squarely within the issues made by the pleadings, and the company introduced evidence upon the subject, it could not complain that the court erred in instructing thereon, though the subject was eliminated by concession at the trial.

Railroads—Fires—Company's Duty.*—A railway company must exercise reasonable care to keep its right of way at points adjoining the private property of others free from combustible materials liable to become ignited from passing trains.

Same—Defects in Engine.—Where grain is burned by a fire originating on a railway right of way through sparks escaping from a passing engine and spreading to the field, it is immaterial to the company's liability whether the engine was improperly equipped.

Same—Management of Engine.†—As to the liability of a railway company for loss caused by fire originating on its right of way through sparks from a passing engine spreading to an adjoining field, it was immaterial whether the employees in charge of the engine were careful or negligent in operating it."

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by the Fireman's Fund Insurance Company against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*See foot-note appended to Atchison, etc., Ry. Co. *v.* Sprague (Kan.), 22 R. R. R. 330, 45 Am. & Eng. R. Cas., N. S., 330.

†See second foot-note appended to Louisville & N. R. Co. (Ala.), 13 R. R. R. 836, 36 Am. & Eng. R. Cas., N. S., 836.

Edward J. Cannon, for appellant.
H. N. Martin and *O. C. Moore,* for respondent.

HADLEY, C. J. This action was brought to recover damages on account of the destruction by fire of standing wheat in an open field. One Nichols was the owner of the wheat, and the field adjoins the right of way of the Northern Pacific Railway Company. The complaint alleges that the fire was due to the negligence of the railway company. The suit was brought by the Fireman's Fund Insurance Company against the railway company, and said Nichols was also joined as a party plaintiff. The insurance company had, prior to the fire, issued a policy of insurance to Nichols to protect him against loss by fire in the wheat. After the fire the loss was adjusted, and the insurance company paid Nichols $322.57 on account of the loss. The insurance company, claiming that it is entitled to be reimbursed by right of subrogation, then brought this suit against the railway company. At the trial any claim in favor of Nichols was dismissed. The complaint charged negligence of the defendant in permitting a large amount of dry, combustible material to accumulate on its right of way at the point were the right of way adjoins the premises of Nichols, also that the locomotive appliances were defective, and that sparks were, by reason thereof, permitted to escape, causing the fire. Negligence was denied. The cause was tried before a jury, and a verdict was returned against the railway company for the exact sum which the plaintiff company paid Nichols on account of said loss. Judgment was entered in accordance with the verdict, and, the defendant's motion for new trial having been denied, it has appealed.

Appellant first assigns error in that judgment was entered against it and that its motion for a new trial was denied. It is argued that the evidence is insufficient to sustain the verdict. We think this contention is not well taken. The evidence showed that much dry grass, from four to five inches in height, was permitted to stand upon the right of way at the place where witnesses testified the fire started, and from which it immediately spread into the adjoining wheat field where the damage was done. The fire occurred in August, and the testimony showed that the grass was very dry. It was also shown that the fire sprang up very soon after one of appellant's trains had passed the spot at which, it is claimed, the fire began, the spot being on the right of way near the track. We think there was sufficient evidence to sustain the verdict.

Error is urged upon the following, which was the concluding sentence of an instruction given by the court: "If you do not find the defendant railway company, through its officers or agents, was the cause of that fire, then you should find for the defendant." It is argued that the above in effect stated to the jury that, if the railway company started the fire, it is liable, no matter what

the circumstances were or what degree of care it exercised, whereas it was required by the law to exercise only reasonable care. We think no such inference could have been drawn when the instructions given the jury were considered together, as we have frequently held they must be. They were clearly instructed that the railway company was required to exercise reasonable care. That they understood such to be the standard and test of appellant's liability we think there can be no doubt. The same comment is applicable to assignment of error No. 4, which relates to another instruction. It is also argued that some of the instructions are inconsistent, but we are satisfied that, when they were read and considered as a whole, no confusion could have arisen in the minds of the jurors.

It is next contended that the court by its instructions submitted questions to the jury which were not within the issues. It is insisted that all questions of negligence touching any defective condition of the engine and its appliances were eliminated from the case, and that the only matter of negligence left for the consideration of the jury was that relating to the accumulation of dry and combustible material upon the right of way. The matter of negligence in the use of defective appliances was squarely within the issues made by the pleadings, but appellant urges that, by concession at the trial, this subject was eliminated. The record, however, discloses that appellant was permitted to introduce much evidence upon this subject over respondent's objection; and, in view of such circumstances, evidence upon the subject having been brought before the jury by appellant itself, we think it should not now be heard to urge reversible error because the court instructed upon the subject.

The following instruction, which was given by the court, is criticised by appellant: "You are instructed that it is the duty of the railway company to exercise reasonable care to keep its right of way at all points adjoining the private property of others free from combustible materials which are liable to become ignited from passing trains. And, should you believe from the evidence that the grain in question was burned because of a fire which originated on the right of way of the company through sparks escaping from a passing engine, which thereafter spread to the grain field in question, then it is immaterial whether the engine of the railway company was improperly equipped or not. And it is likewise immaterial, should you find that the fire which caused the injury escaped from the right of way of the railway company under the circumstances just stated, whether the employees in charge of the engine were skillful or careful, or negligent and careless, in the operation of said railway engine, and your verdict should be for the plaintiff in either case, should you find that the fire escaped from the right of way of the railway company, after having been set through sparks escaping from a

passing engine." We find no error in the quoted instruction. It is a clear and unobjectionable statement of the law applicable to the presence of combustible material upon the right of way negligently permitted to accumulate. It is in effect the same statement of the law as that contained in the following more elaborate statement of an eminent author: "A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotives. A neglect of these precautions will render it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape. This is a duty which is implied in the grant of power to use locomotive engines. A franchise of this nature must be strictly construed; and it would be unreasonable to presume that, in granting the privilege to use this dangerous agent, the Legislature intended to give them the privilege of running their engines on premises surrounded and covered with combustible material. The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives as is the use of inventions for preventing the escape of fire from the locomotives themselves. Decisions are numerous which affirm the liability of railroad companies for negligence in failing to perform this duty, where adjacent property is burned by reason of the neglect of it, notwithstanding it may have used due care in providing proper appliances to arrest the scattering of fire by its engines, and due care in the running of its engines so as to avoid setting fire to adjacent property. A round statement of this doctrine is that, where a railroad company sets fire to the dry grass and other combustible material, which it has negligently suffered to accumulate on its right of way, and, without fault of the adjacent owner, permits such fire to escape to his lands and burn and destroy his property, it will be liable to him for the damages, whether the escape of such fire was due to its negligence or not." 2 Thompson on Negligence, § 2270. Many authorities are cited by the author in support of the above, and again, in section 2280 of the same volume, reference is made to the subject as follows: "It has been well reasoned that, where the railroad company negligently permitted combustible material to accumulate on its right of way, from which a fire, communicated by one of its locomotives, spread to the property of an adjoining landowner, the question whether the fire was started through negligence in supplying the locomotive with proper appliances to prevent the spread of fire, or in keeping it in proper repair, or in operating it on the particular occasion, became immaterial. In such a case it has been held no error to exclude evidence as to what kind of a smokestack, fire box, and ash pan were in use on the defendant's locomotives."

We find no prejudicial error in the record, and the judgment is affirmed.

ROOT, MOUNT, CROW, and FULLERTON, JJ., concur.

SOUTHERN RY. CO IN KENTUCKY *v.* CLARK.

(Court of Appeals of Kentucky, Nov. 20, 1907.)

[105 S. W. Rep. 384.]

Railroads—Injuries to Pedestrian—Crossing Train—Invitation—Authority of Brakeman.*—Where plaintiff was injured while climbing between the cars of a freight train standing over a highway crossing, the railroad company was not liable because plaintiff was invited to cross by a brakeman; the conductor being the representative of the railroad company in control of the train, and the brakeman having no authority to extend such invitation.

Same—Trespassers—Care Required.†—Where a railroad crossed a highway, the railroad company had an equal right with travelers to use the highway at the crossing, so that, the railroad company not having obstructed the crossing with a freight train for an unreasonable time, a traveler attempting to pass over between the cars was a trespasser, as to whom the railroad company owed no duty until his peril was discovered.

Same—Contributory Negligence.*—Where plaintiff attempted at night to cross over a freight train to which an engine was attached while the train was blocking the highway crossing, and was injured by his heel becoming caught between the bumpers, he was negligent as a matter of law.

Same—Assumed Risk.—Where plaintiff, at the invitation of a brakeman, attempted to climb over a freight train to which an engine was attached, blocking a crossing at night, he assumed the risk, and could not recover for injuries sustained, in the absence of proof that those in charge of the train knew or could have known of his presence between the cars when they were moved.

Appeal from Circuit Court, Anderson County.

"Not to be officially reported."

Action by R. T. Clark against the Southern Railway Company in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*For the authorities in this series on the subject of contributory negligence in climbing over obstructing trains, see foot-notes appended to Russell *v.* Central of Georgia Ry. Co. (Ga.), 12 R. R. R. 310, 35 Am. & Eng. R. Cas., N. S., 310; Sheridan *v.* Baltimore & O. R. Co. (Md.), 16 R. R. R. 766, 39 Am. & Eng. R. Cas., N. S., 766.

†For the authorities in this series on the subject of the care due trespassers on trains or street cars, see foot-notes appended to Massell *v.* Boston Elev. Ry. Co. (Mass.), 21 R. R. R. 57, 44 Am. & Eng. R. Cas., N. S., 57; foot-notes appended to Graham *v.* Chicago & N. Ry. Co. (Iowa), 20 R. R. R. 811, 43 Am. & Eng. R. Cas., N. S., 811; foot-notes appended to Toledo, etc., R. Co. *v.* Gordon (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544.

Humphrey & Humphrey and *Willis & Todd,* for appellant.
Charles Carroll and *W. H. Morgan,* for appellee.

LASSING, J. On the 22d day of January, 1907, appellee went from his home to Avenstoke, a small village in Anderson county, about 10 miles west of Lawrenceburg, and in doing so had to cross the tracks of appellant company. He reached the village shortly after 6 o'clock, went to the post office, and, having received his mail, started to return to his home. When he reached appellant's track the road was blocked by a freight train. He saw a brakeman with a railroad lantern in his hand standing on the opposite side of the train, and he inquired of him how long they were going to be there, and the brakeman answered 15 or 20 minutes, and asked him if he wanted to cross over, and, upon being told that he did, the brakeman said, "Are you in a buggy or wagon?" and, being informed that he was "footback," the brakeman said, "You got plenty of time; come right through; you will be safe," and the brakeman thereupon swung his lantern and walked away, and he attempted to climb in between the cars, his heel caught between the bumpers, and he was injured. To recover for this injury he filed his suit in the Anderson circuit court against appellant, alleging that appellant permitted its freight train to stand and remain on and across the public road, and while so standing he, with the full knowledge and consent and by the direction of the defendant, and its agents and employees in charge of the train, attempted to cross the public road between the cars, and that while so doing without any notice to him the train was suddenly moved, and that by reason of this carelessness and negligence on the part of those in charge of the train he was injured. The defendant company answered, traversing the allegations of the petition and pleading contributory negligence. On the issue thus joined a trial was had, which resulted in a verdict in favor of appellee, and the company prosecutes this appeal.

Appellant insists that the evidence shows that there was no negligence whatever on the part of the company, and that a peremptory instruction should have been given at the close of plaintiff's testimony, and, further, that the proof shows that appellee was guilty of such contributory negligence as should prevent a recovery. There is nothing in the evidence to show that any one in charge of appellant's train knew, or by the exercise of the highest degree of care could have known, that appellee was between the cars when the train was started. It is true that appellee says that the person to whom he spoke was a brakeman; but he says, further, in his testimony, that his reason for presuming that he was a brakeman was because he carried a railroad lantern. He testified, further, however, that at the time that he attempted to cross between the cars this individual had moved away toward the station and was not present; nor does he state that he

notified the man with the lantern that he contemplated taking his advice and attempting to cross over. Giving appellee the full benefit of his testimony, and conceding that the person to whom he was talking was a brakeman, yet the company would not be liable because of the invitation of the brakeman to appellee to cross over; for it has been expressly held in the case of Skirvin *v.* L. & N. R. R., 100 S. W. 308, 30 Ky. Law Rep. 1208, that a brakeman has not the power by virtue simply of his position to bind his employer, but that the conductor is the representative agent of the company as to the train in his charge, so that, when appellee undertook to pass over or between the cars, he was a trespasser, and the company owed him no consideration until his peril was discovered. There is no proof whatever in the record tending to show that even the brakeman, much less the other agents of the company in charge of the train, knew that appellee was attempting to pass over between the cars. Appellee and the appellant company had an equal right to the use of the public road at the crossing; but, the company being in possession of it in a lawful manner, for a lawful purpose, and without unnecessary delay, when appellee attempted to cross over between the cars he became a trespasser.

It is a well-settled rule that if one, at the time and place of his injury, was careless and negligent as to his own safety, and by reason of such carelessness and neglect on his part so contributed to his injury that it would not have occurred but for such negligence on his part, he cannot recover. To cross over or between freight cars to which an engine is attached is a difficult and dangerous undertaking in the daytime, and this undertaking is much more hazardous at nighttime; and when one attempts to do so in either daytime or nighttime, without having first notified the engineer or the conductor, he is certainly guilty of a reckless disregard for his own personal safety. In Elliott on Railroads, vol. 3, § 1169, it is said: "Although a railroad company may be guilty of negligence in suddenly moving cars, without warning, which it has left at a crossing with a space between them inviting people to pass through, yet there can be no recovery for mere negligence in this respect if the injured party is guilty of contributory negligence. In such cases questions of negligence on the part of the company and that of contributory negligence on the part of the person injured are usually questions of fact for the jury to determine under all the circumstances. But where no space is left between the cars, and an engine is attached to them, which is liable to move them at any moment, one who attempts to pass over or under them may be declared guilty of contributory negligence as matter of law. The same is true where he attempts to climb over them without looking to see whether they are attached to an engine or not, and is injured in consequence thereof, or to pass between cars which

had broken loose, and which he knows, or ought to know by using his faculties, are likely to move at any moment. So it has been held that a child only 13 years old was guilty of negligence as matter of law in attempting to pass between two sections of a freight train eight feet apart, although they were at a standstill when she reached the crossing, but were started together just before she stepped on the track between them." And in Thompson's Commentaries on the Law of Negligence, vol. 2, § 1674, we find the following: "Injuries received while making such attempts have been very frequent. The view of the writter—for whatever it may be worth—on this question is this: If the train is lawfully obstructing the crossing—that is to say, if it has not obstructed it for a greater length of time than prescribed by statute or ordinance, or, in the absence of statute or ordinance, for an unreasonable length of time—then a pedestrain who attempts to continue his journey upon the highway by climbing over or between the cars does so at his own risk. The railroad company is under no obligation to keep a special lookout for him, or to take special pains to provide for his safety; but his position is substantially that of a trespasser upon its property, and it is not different in law from what it would be if the train were not obstructing a highway crossing. But after the train has obstructed the crossing beyond the length of time prescribed by statute or ordinance, or beyond a reasonable length of time in the absence of statute or ordinance, then the railway company is guilty of an unlawful obstruction of the highway, which is an indictable nuisance, the right of passage on the part of the public is restored; and if pedestrians undertake to exercise that right by climbing over the obstructing train the railroad company must see to it that it does not kill them or injure them while so doing, by an affirmative act of its own, namely, by starting forward its train without giving them any warning of its purpose to do so, or without looking out for their safety in any way. American courts have, however, held with great unanimity that in such cases the injury is to be ascribed as a matter of law to the contributory negligence of the traveler, and there can be no recovery of damages against the railroad company."

In the case of L. & N. Railroad Company *v.* Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, this court, in denying one injured between two freight cars the right to recover, said: "It was gross negligence in appellee to stand between the cars for this purpose, and, there being no proof that his danger was perceived by those in charge of the train before the injury, or in time to avoid it, a peremptory instruction should have been given to the jury to find for the defendant." And in the case of Southern Railway Company in Kentucky *v.* Thomas, 92 S. W. 578, 29 Ky. Law Rep. 79, this court said: "If a person who was in no way connected with the road had gone up to the station on business

with it, and had climbed between these cars for the purpose of getting over to the office, and had been hurt just as the plaintiff was, it could not be maintained that the company would be liable to him. In such a state of case, though there on business, he would be in a place where he had no right to be, and where his presence was not reasonably to be anticipated. The engine attached to these cars was in plain view, and every one who sees a train of cars with an engine attached must know that they are liable to move, and it is hazardous to go between them. While he [appellee] was not a trespasser upon the grounds of the company, he took the risk when he undertook to climb between the cars of the train. If a person intending to take passage on the train had done the same thing, had been hurt, if he would not be held as a trespasser, it would be held that he was at a place where he had no business to be and that he took the risk."

Applying the facts in this case to the authorities above cited, we are of opinion that appellee, in attempting to cross over between the cars, assumed a risk for which the appellant company was in no wise responsible; that the person to whom he spoke before attempting to cross over, even though a brakeman, had no authority to bind the company; and, there being no evidence whatever that those in charge of the train knew or could have known of appellee's presence between the cars when they were moved, appellee should not and cannot recover for an injury which was the result of his own negligence. The trial court should have peremptorily instructed the jury to find for the defendant company.

Judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

CRAMER *v.* BROOKLYN HEIGHTS R. CO.

(Court of Appeals of New York, Dec. 20, 1907.)

[83 N. E. Rep. 35.]

Carriers—Personal Injuries—Care Required.*—Where workmen are engaged and material changes are continually being made along the street car tracks, those in charge of a car, particularly when it is crowded to the running board with passengers, should exercise special care to avoid accidents.

Same—Negligence—Question for Jury.*—Plaintiff was a passenger in a street car, the seats of which were occupied, and he rode on the running board. Workmen had been excavating the street, and had built a fence near the car track, allowing a beam to project over where the running board would be. Held, that whether or not de-

*For the authorities in this series on the subject of the liability of carriers for injuries to passengers by collisions with objects near tracks, see extensive note, 3 R. R. R. 525, 26 Am. & Eng. R. Cas., N. S., 525; Tietz *v.* International Ry. Co. (Mass.), 24 R. R. R. 411, 47 Am. & Eng. R. Cas., N. S., 411 (negligence of conductor in allowing passenger to ride on running board without warning him of danger from proximity of trolley poles); Forsythe *v.* Los Angeles Ry. Co. (Cal.), 24 R. R. R. 447, 47 Am. & Eng. R. Cas., N. S., 447 (negligence of driver of other vehicle was no defense where passenger was injured by reason of collision between such vehicle and his street car); Chicago City Ry. Co. *v.* Shreve (Ill.), 23 R. R. R. 444, 46 Am. & Eng. R. Cas., N. S., 444 (negligence in running street car towards certain opening in wall, used as passage way for vehicles, was question for jury, in action for injury to passenger sustained in collision between his car and another vehicle); Egan *v.* Old Colony St. Ry. Co. (Mass.), 23 R. R. R. 406, 46 Am. & Eng. R. Cas., N. S., 406 (inference of negligence where street car passenger, who was riding on running board, was thrown against wagon as car passed switch); Atchison, etc., Ry. Co. *v.* Calhoun (Okl.), 22 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791 (duty to keep depot platform free from obstructions dangerous to passengers alighting from moving cars); Chicago Union Traction Co. *v.* Mee (Ill.), 21 R. R. R. 715, 44 Am. & Eng. R. Cas., N. S., 715 (presumption of negligence where street car passenger was injured by reason of collision between car and passing wagon); Bridges *v.* Jackson, etc., Co. (Miss.), 16 R. R. R. 512, 39 Am. & Eng. R. Cas., N. S., 512 (fact that trolley pole by which passenger was struck while on running board, was slightly nearer track that the two poles on each side of it does not tend to prove that the pole was dangerously near the track, nor does it show gross negligence, the other poles being further from the track than necessary); Buehler *v.* Union Traction Co. (Pa.), 1 R. R. R. 92, 24 Am. & Eng. R. Cas., N. S., 92 (liability for negligence of motorman, in action for injury to passenger caused by falling wall); Bridges *v.* Jackson, etc., Co. (Miss.), 16 R. R. R. 512, 39 Am. & Eng. R. Cas., N. S., 512 (mere fact that passenger was struck by trolley pole while on running board did not even tend to prove that the pole was too near the track); Thurston *v.* Detroit

fendant's motorman was negligent in running past the fence at a high rate of speed, and failing to see the beam or to appreciate its danger, was a question for the jury.

Same—Contributory Negligence.†—It is not contributory negligence as a matter of law for a passenger to ride on the running board of a crowded street car.

Same.—Where a street car is crowded, a passenger riding on the running board assumes only the natural and usual risks of that position.

Appeal—Presentation of Objections below—Sufficiency of Evidence.—In an action against a street car company for personal injuries, where it was assumed on the trial that plaintiff was a passenger and defendant acquiesced in such assumption, and the complaint was dismissed at the trial because the evidence showed no negligence on defendant's part, and did show plaintiff's contributory negligence, defendant cannot urge for the first time on appeal that there was no evidence that plaintiff was a passenger.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by William Cramer against the Brooklyn Heights Railroad Company. From a judgment of the Appellate Division af-

United Ry. Co. (Mich.), 12 R. R. R. 434, 35 Am. & Eng. R. Cas., N. S., 434 (negligence was question for jury where collision between car and ice wagon); Talbert *v.* Charleston, etc., Ry. Co. (S. Car.), 17 R. R. R. 53, 40 Am. & Eng. R. Cas., N. S., 53 (one-armed passenger knocked off by trunk near moving car, while boarding it by direction of conductor, sufficiency of complaint); McCord *v.* Atlanta, etc., R. Co. (N. Car.), 10 R. R. R. 275, 33 Am. & Eng. R. Cas., N. S., 275 (presumption of negligence from fact that passenger's arm was struck by suspended mail pouch); Fagan *v.* Rhode Island Co. (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22 (presumption of negligence from fact of collision between electric car and another vehicle); Jones *v.* United Rys. & Elec. Co. (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631 (presumption of negligence where street car passenger was struck by projecting load on passing wagon); Christensen *v.* Metropolitan St. Ry. Co. (C. C. A.), 18 R. R. R. 250, 41 Am. & Eng. R. Cas., N. S., 250 (screens for street car windows, whether sufficient to prevent passengers from being struck by trolley poles); Bridges *v.* Jackson, etc., Co. (Miss.), 16 R. R. R. 512, 39 Am. & Eng. R. Cas., N. S., 512 (not negligence to fail to maintain guard rail on side of car next to trolley poles, for protection of passengers, where such poles are not dangerously near track, and the danger therefrom is obvious); Harrison *v.* Sutter St. Ry. Co. (Cal.), 23 Am. & Eng. R. Cas., N. S., 809 (presumption of negligence where passenger was injured in collision between street car and wagon); Shelton *v.* Louisville & N. R. Co. (Ky.), 8 Am. & Eng. R. Cas., N. S., 678 (liability for death of passenger, whose head, while protruding from car window, was struck by upright in tunnel).

†See foot-notes appended to Egan *v.* Old Colony St. Ry. Co. (Mass.), 23 R. R. R. 406, 46 Am. & Eng. R. Cas., N. S., 406.

firming a judgment of the Municipal Court (114 App. Div. 804, 100 N. Y. Supp. 276), plaintiff appeals. Reversed.

Charles M. Stafford, for appellant.
I. R. Oeland and *George D. Yeomans,* for respondent.

CHASE, J. The plaintiff, while riding in Flatbush avenue in the borough of Brooklyn, city of New York, on the running board of one of the defendant's open cars, was hit by a plank or beam temporarily projecting at right angles from a fence which had been erected along the tracks on which the car was proceeding. He was thrown from the car, and received the injuries to recover damages for which this action is brought. On the trial of the action, at the close of the plaintiff's testimony, his complaint was dismissed.

The jury could have found that the plaintiff boarded a Third Avenue car at Tenth street and Third avenue in said borough with the intention of proceeding thereon to the borough of Manhattan. When he stepped upon the running board, he found that every seat in the car was taken, and he could not get inside the car. He remained upon the running board with six or eight other persons, facing the front, holding to the car with his left hand. Other persons boarded the car between Tenth street and the place where the accident occurred. Along the line of the defendant's tracks on Flatbush avenue workmen were engaged in excavating, and the fence mentioned had been erected in connection with said work. The car ran very fast, and as it turned into Flatbush avenue its speed was increased. As it continued along said avenue it was going at a high rate of speed, and the plaintiff hung close to the car, and his coat brushed against the rail of the fence. Plaintiff did not see the plank or beam, but, when he was struck by it he clung to the car, and was dragged 10 or 15 feet, after which he dropped to the ground in a dazed condition. The man standing on the running board nearest to the front of the car saw the plank or beam sticking out from the fence when it was three feet from the front of the car and in time, so that, as the car approached it, he jumped over it, and escaped being hit. The end of the plank or beam was a little higher than the running board and extended four inches over the outer edge thereof, and it swept all of the persons standing on the running board off from the car, with the exception of the man who was near the front of the car and jumped over it as stated, and the conductor, who was the last one of the persons standing on the running board near the rear of the car.

The rules of law applicable to cases of this kind are very familiar, and it is not necessary to state them at length. Where workmen are engaged and material changes are continually being made along the tracks on which a street surface car is being run, those in charge of the car, particularly if it is crowded to the

running boards with passengers, should exercise special care and watchfulness to avoid accidents. It was clearly a question of fact for the jury to determine whether the defendant's motorman was negligent under the circumstances disclosed in this case in running the car at a high rate of speed along the place where the accident occurred, and also in failing to see the plank or beam extending from the fence, or, if he saw it, in failing to appreciate its danger and stopping the car. It was not contributory negligence on the part of the plaintiff as a matter of law to ride on the running board. Cattano *v.* Met. Street R. Co., 173 N. Y. 565, 66 N. E. 563; Wood *v.* Brooklyn City R. R. Co., 5 App. Div. 492, 38 N. Y. Supp. 1077. The plaintiff in standing on the running board assumed but the natural and usual risks of that position. Cattano *v.* Met. Street R. Co. supra.

It is urged that the record does not disclose that the plaintiff was ever accepted by the defendant as a passenger. It does not affirmatively appear that the car was stopped at the plaintiff's request to allow him to enter it or that he paid his fare to the conductor. It was assumed during the trial that the plaintiff was a passenger. Plaintiff, on being sworn as a witness, was asked: "Q. Will you tell the jury whether or not you were riding on a trolley car as a passenger? A. Yes. Q. What trolley line? A. Third Avenue. * * * Q. Were there any other passengers standing on that step? A. Yes." No objection was made to these questions, and subsequently the plaintiff was asked: "Q. Can you state how far the car was from the other passengers who were thrown off?" The defendant objected upon the ground that "there is nothing to show where the other passengers fell." It is not disputed that the plaintiff rode with the other persons on the running board for more than a mile before the accident occurred, and the conductor who, at the time of the accident, was on the running board near the rear end of the car, had not in any way questioned the right of the plaintiff to remain thereon as a passenger. At the close of the plaintiff's case, defendant's motion to dismiss the complaint was made "on the ground that there has been no evidence of negligence on the part of the defendant." No other ground for dismissing the complaint was suggested. The court on granting the motion said: "I do not think there was any negligence on the part of the railroad company, and I do think there was contributory negligence on the part of the plaintiff, and for that reason I am going to dismiss the case." The defendant's counsel was silent when he should have spoken if he intended to insist that the plaintiff had not been accepted by the defendant as a passenger. His failure to contest the plaintiff's claim that he was a passenger naturally led the plaintiff to assume that his claim to that extent was not disputed. If the defendant had insisted on the trial by objection or otherwise that it should not be assumed that the plaintiff was a passenger

on the car, the plaintiff could perhaps have shown that he had paid his fare, or have produced other affirmative evidence conclusively establishing the fact that he was a passenger. We do not mean to hold that there was a failure of proof on that subject, but, even if we assume that the record as it stands is not sufficient to sustain a finding that the plaintiff was a passenger on the car, the defendant should not be allowed to take advantage on appeal of such lack of proof when on the trial it was assumed by the parties and the court that such fact was admitted, or at least not controverted. N. Y. C. & H. R. R. R. Co. *v.* City of Rochester, 127 N. Y. 591, 28 N. E. 416; Brown *v.* Cayuga & Susquehanna R. R. Co., 12 N. Y. 486; Wilson *v.* Rocke, 58 N. Y. 642.

The judgment should be reversed and a new trial ordered in the Municipal Court, Fifth District, borough of Brooklyn, city of New York, with costs to abide the event.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment reversed, etc.

CHESAPEAKE & O. RY. CO. *v.* FORTUNE.

(Supreme Court of Appeals of Virginia, Nov. 21, 1907. Rehearing Denied.)

[59 S. E. Rep. 1095.]

Carriers—Injuries—Persons Accompanying Passengers—Duty of Carrier.*—Where plaintiff went to defendant's station to accompany his wife and children, who intended to become passengers on defendant's train, and plaintiff was injured by the premature starting of the train while he was endeavoring to place his wife's baggage aboard, plaintiff was on defendant's premises by its implied invitation, and defendant was therefore bound to exercise ordinary care for his safety.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to persons assisting or accompanying their passengers, see foot-notes appended to Seaboard Air Line Ry. Co. *v.* Bradley (Ga.), 24 R. R. R. 183, 47 Am. & Eng. R. Cas., N. S., 183; foot-notes appended to Louisville & N. R. Co. *v.* Wilson (Ky.), 22 R. R. R. 830, 45 Am. & Eng. R. Cas., N. S., 830; Cincinnati, etc., Ry. Co. *v.* Giboney (Ky.), 22 R. R. R. 803, 45 Am. & Eng. R. Cas., N. S., 803; foot-notes appended to Morrow *v.* Atlanta & C. Air Line Ry. Co. (N. Car.), 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290, where all the preceding ones are collected.

Chesapeake & O. Ry. Co. *v.* Fortune

Same—Evidence.†—Plaintiff, having been injured while on a carrier's premises to assist his wife and children to board a train, being entitled to assume that the carrier would stop a reasonable length of time to enable passengers and baggage to be put aboard, it was not error to permit him to testify that when he attempted to put the baggage aboard, as the train was standing, he believed it would remain so until his wife could get in the car and until he could get the baggage on.

Witnesses — Character Evidence — Admissibility.—Where defendant's cross-examination of plaintiff was such as to question his truthfulness indirectly, evidence to support his reputation for truth and veracity was admissible.

Damages—Personal Injuries—Excessiveness.‡—Where plaintiff, a man of good health and character, in the prime of life, suffered the loss of a leg by defendant's negligence, a verdict allowing him $5,500 was not excessive, under the rule that a verdict will not be disturbed unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by a mistaken view of the merits of the case.

Trial—Instructions—Requests—Instructions Already Given.—Refusal of proper instructions is harmless, where the charge given fully covered the case.

Error to Circuit Court, Alleghany County.

Action by R. L. Fortune against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

R. L. Parrish, for plaintiff in error.
Jno. T. Delaney and *George A. Revercomb,* for defendant in error.

KEITH, P. R. L. Fortune brought suit in the circuit court of Alleghany county to recover damages for the loss of his leg, occasioned, as he alleges, by the negligent conduct of the Chesapeake & Ohio Railway Company. There was a verdict and judgment

†For the authorities in this series on the question whether a person injured by reason of the conduct of another had the right to assume that the latter had or would perform the duties owing to the injured person, or whether it was the duty of the injured person to anticipate negligence on the part of the person by whose negligence he was injured, see foot-notes appended to O'Brien *v.* St. Paul City Ry. Co. (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323, where they are all collected or referred to.

‡For the authorities in this series on the subject of the amount of damages recoverable for loss of or injury to a person's limb or limbs, see foot-notes appended to Campbell *v.* Railway Transfer Co. (Minn.), 22 R. R. R. 61, 45 Am. & Eng. R. Cas., N. S., 61, where all those preceding it are collected; Pittsburgh, etc., Ry. Co. *v.* Simons (Ind.), 25 R. R. R. 283, 48 Am. & Eng. R. Cas., N. S., 283.

in his favor for 5,500, to which the railroad company obtained a writ of error.

The first assignment of error is that the court overruled the demurrer to the declaration.

There were five counts in the declaration, which state the plaintiff's case in a manner somewhat varying as to details; but the cause of action is set forth substantially as follows: That Fortune accompanied his wife and two small children, aged, respectively, two and four years, to "Mallow," a station on the Chesapeake & Ohio Railway, his wife and children intending to take train No. 14; that the station is what is known as a flag station, at which there is no depot, ticket office, baggage office, platform, portable step, or any other means or appliance to facilitate ingress and egress to and from the trains that stop at that station; that the train stopped at a point where the public road crosses the railroad track, so that a passenger could step from the road upon the steps leading to the platform of the coach appropriated to colored people, or upon that appropriated to white passengers, which was the last coach in the train; that after his wife and two children had been assisted to the platform of the coach for colored people they passed across the platform to the rear coach, in which they were to be accommodated, and defendant in error, who had in his charge a valise or telescope belonging to his wife, and while the train was still at rest, undertook to put the valise or telescope upon the platform, so that his wife could take it with her; but while so engaged, and in a position perfectly open and obvious to the train crew, the train was put in motion, he was carried along with it, and received the injury for which he sues.

The theory of defendant in error (plaintiff in the court below) is that, having accompanied his wife and children, who intended to become passengers on the Chesapeake & Ohio Railway, to the station, he was there by invitation, and that it was the duty of the railroad company to use reasonable and ordinary care not to do him an injury.

The theory of plaintiff in error is that Fortune was at most a mere licensee, to whom the railroad company owed no duty, except that it should not injure him willfully or recklessly.

We are of opinion that the position of plaintiff in error cannot be maintained. We think it plain that one who accompanies his wife and small children to a station where they expect to take a train and become passengers is there by the implied invitation of the railroad company; that it is the duty of a person upon the premises of a railroad company for such a purpose to exercise reasonable precaution for his own safety, and proceed with reasonable diligence to discharge the duty in which he is engaged; and that, while upon the premises under such conditions, it is the duty of the railroad company to exerise ordinary care for his safety and protection. This proposition seems to us too plain

to need either argument to enforce it or authority to maintain it.

Without discussing the numerous cases cited, we shall content ourselves with an extract from 5 Am. & Eng. of Law (2d. Ed.) 518: "Persons going upon a carrier's premises, or entering a carrier's vehicle, to assist a passenger, to greet an arriving passenger, or to take leave of a departing passenger, cannot be deemed passengers themselves. Nor are they trespassers, properly speaking. They should be considered rather in the light of licensees, to whom the carrier owes certain duties."

And in Fetter on Carriers of Passengers, § 237, it is said: "One who escorts a passenger to a station or to a seat in a train is not a mere trespasseer, to whom the company owes no duty except to abstain from willful injuries; nor, on the other hand, is he a passenger towards whom the company is bound to the exercise of the highest degree of care and skill; but he is on the company's premises on its implied invitation, and it is bound to exercise ordinary care for his safety."

The second error assigned is to the action of the trial court in permitting the attorney for defendant in error to ask the following question: "When you attempted to put the baggage on the train was standing still. Did you believe the train would remain standing still until your wife could get in the car where she had to go, and until you could get the baggage on? A. That is what I expected.

The objection taken to this ruling is that Fortune showed by his own testimony that he had never been to Mallow Station but once before, that he was unfamiliar with the surroundings, and he did not know what time trains usually stopped at Mallow, and had no right to presume that they would stop any given length of time. All of which is, perhaps, true; but it still remains that it was the duty of the company to stop a reasonable length of time to enable passengers and baggage to be put upon the train, and Fortune had a right to suppose that the railroad company would discharge that duty.

The third assignment of error is to the action of the court in admitting character evidence as to R. L. Fortune's general reputation for truth and veracity, when his reputation for truth and veracity had not been assailed, and the proof of such reputation by persons who were not sufficiently acquainted therewith.

The examination of Fortune was such as to bring the case within the influence of George *v.* Pilcher, 28 Grat. 299, 26 Am. Rep. 350, where this court said: "Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth."

The fourth assignment of error is that the verdict is excessive and that it is contrary to the law and the evidence.

Fortune was a man of good character, good health, in the prime of life, and he suffered the loss of a leg. This court has said in numerous cases that, there being no exact standard by which it is possible to ascertain in money the value of the various elements of damage proper for the consideration of a jury in such a case, this court would not disturb the finding of a jury, unless the damages were so excessive as to furnish evidence of partiality or prejudice, or some corrupt motive, on the part of the jury.

We shall refer only to one case. In Farish & Co. *v.* Reigle, 11 Grat. 697, 62 Am. Dec. 666, there was a verdict and judgment for the plaintiff for $9,000. In that case the plaintiff was injured by the overturning of a stagecoach. His head was severely cut, and one of his legs was broken above the ankle, and at the time of the trial, which occurred about one year after the accident, his leg was not entirely healed and was shortened, the ankle joint was swollen and stiff, and he was obliged to use crutches. The attending physician expressed the opinion that he would be a cripple for life. The court held that the verdict in such a case could not be disturbed, unless the damages allowed were so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or mislead by some mistaken view of the merits of the case.

The fifth assignment of error is to the giving of instructions asked for by the plaintiff, and the refusal to give instructions Nos. 2 and 3, asked for by the defendant.

Without going into a particular discussion of the instructions, we are of opinion that there is no error in the instructions given; that they fully covered the case, and were sufficient to enable the jury correctly to apply the evidence; and that, even though defendant's instructions were in themselves free from objection (about which we express no opinion), the refusal to give them was, under such circumstances, harmless error.

With respect to the evidence, we find that it was ample to support the averments of the declaration; and upon the whole case we are of opinion that there was no error to the prejudice of the plaintiff in error, and the judgment is affirmed.

Affirmed.

KRUGER *v.* OMAHA & C. B. ST. RY. CO.

(Supreme Court of Nebraska, Jan. 8, 1908.)

[114 N. W. Rep. 571.]

Carriers—Injury to Passengers—Duty of Conductor.*—Where a passenger, a girl under 14 years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the defendant's servants in carrying such passenger past her known destination, and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened and frenzied condition, and that she is about to leave the moving car, it is his duty to exercise the highest degree of care possible under the circumstances to prevent such passenger from alighting from the moving car. C., B. & Q. R. Co. *v.* Martelle, 65 Neb. 550, 91 N. W. 364, examined and distinguished.

Same.—In such a case, if the conductor fails to exercise the degree of care required of him, and the passenger in consequence of such failure receives injuries while alighting from the moving car, the street railway company is liable in damages for the resulting injuries.

Same—Contributory Negligence.—In such a case it is erroneous to instruct the jury that the plaintiff may recover, even though she was negligent in acting as she did.

Same—Instructions.—Instructions examined, and held prejudicial. (Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Douglas County; Redick, Judge.

Action by Mette Kruger against the Omaha & Council Bluffs Street Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

John W. Webster and *W. J. Connell,* for appellant.
Arthur C. Pancoase, for appellee

GOOD, C. Mette Kruger, a minor, by her next friend, instituted this action against the Omaha & Council Bluffs Street Railway Company in the district court of Douglas county to recover damages for injuries alleged to have been sustained while alighting

*For the authorities in this series on the subject of negligence in allowing passengers to expose themselves to danger, see foot-notes appended to Stone *v.* Lewiston, etc., St. Ry. (Me.), 14 R. R. R. 240, 37 Am. & Eng. R. Cas., N. S., 240, where all the preceding ones are collected; foot-notes appended to Hogan *v.* Boston Elev. Ry. Co. (Mass.), 25 R. R. R. 167, 48 Am. & Eng. R. Cas., N. S., 167; foot-notes appended to Tietz *v.* International Ry. Co. (N. Y.), 24 R. R. R. 411, 47 Am. & Eng. R. Cas., N. S., 411.

from one of the defendant's street cars. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Two acts of negligence are complained of by the plaintiff: First, that defendant, although informed of and knowing plaintiff's destination, carelessly and negligently failed to stop its car and carried plaintiff past her known destination; secondly, having caused plaintiff to become frightened and frenzied from fear at being carried past her known destination, that defendant failed to exercise that degree of care required of it to prevent plaintiff from alighting from the moving car. Defendant answered, admitting that plaintiff was a passenger, denied any negligence on its part, and alleged contributory negligence on the part of the plaintiff. From the record it appears that Mette Kruger was a girl 13 years and 9 months of age at the time of the injuries complained of; that about 7 o'clock in the evening of the 26th day of October, 1904, she and a girl companion of about the same age were passengers on one of defendant's street cars going westward on Q. street in South Omaha. The destination of the two girls was Thirty-First street. Plaintiff claims that, when the conductor took up their fares at about Twenty-Sixth street, they informed him of their desire to alight at Thirty-First street. The car in which they were riding was one in which the seats ran lengthwise along the side of the car. The two girls sat on the south side of the car near the rear, and were looking out of the car window to the south. At that time in the evening it was dark. The car failed to stop at Thirty-First street, and the plaintiff observed the lights in a neighboring store, reorganized the place, and realized that she and her companion were being carried past their destination. She became alarmed and frightened, hurriedly arose, and passed out upon the rear platform of the car, where the conductor was standing, and stepped from the car while in motion, fell to the pavement, and received severe injuries. The conductor observed the plaintiff as she came out upon the platform and stepped from the moving car. Plaintiff contends that she was so alarmed and frightened and in such a frenzied condition that she did not know or realize her danger in alighting from the moving car, and that the conductor was negligent in failing to warn her of her danger and prevent her from leaving the car under the circumstances. Plaintiff's evidence tends to support her contention. The defendant denied that the conductor had been previoulsy informed of the destination of the girls, and denied that he had any knowledge that plaintiff was frightened and alarmed, and alleged that he did warn her against stepping off by calling to her to wait, that he would stop the car, and that seeing that she did not heed his warning, he attempted to grab her and prevent her from leaving the car. The evidence as to whether the conductor warned the plaintiff, or that he knew of her desti-

nation and her excited condition, or that he attempted to prevent her from leaving the car, is in conflict.

The defendant contends that it was under no obligation to prevent plaintiff from leaving the moving car, that it owned no duty of preventing passengers from alighting from its moving cars, and that, as a matter of law, it was not liable for injuries received by the plaintiff, and that the court should have so instructed the jury. We are cited to several cases from other jurisdictions, some of which apparently hold to this doctrine. But the rule in this state is different. C. B. & Q. R. Co. *v.* Landauer, 36 Neb. 643, 54 N. W. 976; St. Joseph & C. I. R. Co. *v.* Hedge, 44 Neb. 448, 62 N. W. 887; Chicago, B. & Q. R. Co. *v.* Hyatt, 48 Neb. 167, 67 N. W. 8; Fremont, E. & M. V. R. Co. *v.* French, 48 Neb. 641, 67 N. W. 472. It is generally held that whether or not one is guilty of such negligence in alighting from a moving car or train as will prevent a recovery for injuries received therefrom is ordinarily a question of fact to be determined by the jury. Hemmingway *v.* Chicago, M. & St. P. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823. Under some circumstances, jumping or alighting from a moving train has been held such negligence as will defeat a recovery. C., B. & Q. R. Co. *v.* Martelle, 65 Neb. 540, 91 N. W. 364. In that case, however, the plaintiff was a man of mature years, and deliberately jumped from the moving train. It did not appear that he was frightened, or that he had lost his self-control, but that he deliberated upon the matter and after deliberation voluntarily jumped from the moving train. It was held that he was guilty of such negligence and deliberate recklessness as to prevent a recovery. But the case at bar is different. The plaintiff was little accustomed to riding upon street cars, and according to her contention, which finds support in the evidence, she was carried past her destination by the fault of the defendant. It was after dark, and she was frightened and excited, and had no realization of what she was doing, or of the danger incident to the alighting from the moving car. It is inferable from the evidence that the conductor was aware of her excited and frenzied condition, and might, by the exercise of that degree of care required of common carriers, have prevented her from leaving the moving car and thus have avoided the injuries. We think there is a clear distinction between the duty owed by a common carrier to an infant of tender years and that owed to an adult, and between the duty owed to a passenger who has lost control of his mental faculties, of which the carrier is aware, and that owed to one in full possession of his faculties. When street car companies carry passengers of tender years and passengers whom they know to be of unsound mind, it is only proper that they should be required to exercise a higher degree of care toward them than they would toward passengers of mature years and in possession of their full

faculties; and if, by acts of their own negligence, they have caused passengers to become frightened and excited and to be in a measure deprived of their faculties, they cannot consistently and reasonably claim that the passenger is negligent in not exercising the prudence and foresight that they ordinarily would, except for their frenzied and excited condition. We think the record in this case clearly makes out such a state of facts as required the submission of the case to the jury; and this court cannot say, as a matter of law, that the defendant was not negligent, or that such negligence did not produce the injuries complained of. The case was one for the determination of the jury under proper instructions.

Defendant also complains of numeous instructions given by the court upon its own motion, and of the refusal of the court to instruct the jury as requested by the defendant. We have carefully examined all the instructions given and refused that are complained of, and find no error except in two instructions given, which we now proceed to consider. By the sixth instruction the court informed the jury that if the conductor was aware that plaintiff was about to jump from the moving car in time for him to have prevented it, and if he failed to exercise the degree of care required of him in that respect, and if such failure of the conductor was the proximate cause of plaintiff's injuries, the plaintiff might recover, even though they should find "that the plaintiff was guilty of negligence in acting as she did." This instruction, as well as the ninth instruction given by the court, indicates quite clearly that the trial court was applying the doctrine of the "last clear chance," and proceeded upon the theory that, notwithstanding contributory negligence upon the part of the plaintiff, the defendant would still be liable if it could have prevented the injuries to the plaintiff. The doctrine of the "last clear chance" simply means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. Styles *v.* Receivers R. & D. R. Co., 118 N. C. 1048, 24 S. E. 740. We think an analysis of the situation in which the parties in the instant case were placed will show that the doctrine of the "last clear chance" can have no application. If the plaintiff was negligent at all, it was because she knew and realized the danger in alighting from the moving car, and the only negligent act of the plaintiff was in stepping from the car. It is evident that no act of the defendant after the plaintiff had been guilty of negligence could have prevented the injuries. To make the doctrine of the "last clear chance" apply, the situation must be such that the plaintiff might avoid the injuries after the plaintiff had by her own act placed herself in a position of peril that was or should have been apparent to the defendant. If the

plaintiff in this case was guilty of negligence at all, it was in stepping from the moving car with the knowledge and realization of the danger in so doing. If she possessed this knowledge and realization, then the proximate cause of her injuries was her own negligence, and she would not be entitled to recover. As applied to the situation in this case, the only theory upon which the plaintiff can recover is that she did not know and realize the danger in stepping from the moving car. Therefore it follows that her right to recover depends upon the absence of contributory negligence upon her part. The instruction above mentioned misstated the law, and permitted the jury to find for the plaintiff upon a state of facts which in law will not sustain a recovery. The ninth instruction states the same proposition of law in a negative manner, and is bad for the same reason.

There are other errors assigned and discussed in the brief of the appellant; but as they are not necessary to a determination of this case, and do not appear likely to arise upon a new trial, we refrain from discussing them. Because of errors in the court's instructions to the jury, we recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

CINCINNATI, N. O. & T. P. RY. CO. *v.* CHAMP.

(Court of Appeals of Kentucky, Oct. 29, 1907.)

[104 S. W. Rep. 988.]

Railroads—Accidents at Crossings—Contributory Negligence.—Where a railroad company established an electric bell at a crossing near a town and about 200 yards from a sharp curve in a deep cut, but the bell would ring when cars or trains were standing on the tracks near the depot or yards as well as when trains were approaching, and as a consequence was ringing most of the time, the ringing of the bell would be a circumstance to be considered by the jury, in connection with other evidence, but it would not in itself render the attempt to cross the track at such a time contributory negligence.

Same—Statutory Regulations—Crossing Signals.—The statutory duty to ring the engine bell or blow the whistle at a crossing is imperative, and failure to comply with it is negligence on the part of the railway company, even though it may have adopted other means of warning, less effective than gates or flagmen.

Same—Accidents at Crossings—Duty of Person Crossing.—One is not required to stop, look, and listen before going over a railway crossing, but only to observe such degree of care as the situation and surroundings of the crossing may reasonably demand; but if he knows, or by the exercise of ordinary care and prudence could know, of the approach of a train, it is his duty to allow it to pass before crossing, and failure to exercise such a measure of care will relieve the company of liability for injuries sustained.

Same—Questions for Jury.—In an action for personal injuries sustained at a railroad crossing, whether the safety of the public required that exceptional means, other than the statutory signals, should be provided to avoid injury to persons using the highway, held, under the evidence, a question for the jury.

Same—Duty to Provide Watchman.*—Where a railway crossing is unusually dangerous, the company must employ such means as are reasonably necessary, considering its character, to warn travelers of the approach of trains; and this duty may require the presence of a flagman, even if the railroad commission has not required one.

Same—Questions for Jury.—What degree of care required of a railway company to protect travelers at crossings depends upon the facts of each case and is a question for the jury.

Same—Rate of Speed.—At exceptionally dangerous crossings, if the railroad company does not choose to have a flagman or other safety device, and the statutory signals are not sufficient, the speed of the train must be so regulated as not to unnecessarily impair the

*See note at end of case.

safety of persons using the highway.

Same—Mutual Duties at Crossings.—The obligations of a railroad company and a traveler at a crossing to avoid injury and accident are reciprocal, and must be commensurate with the danger. Under the same conditions and circumstances, law requires each party to exercise the same degree of care and prudence.

Same—Instructions.—In an action against a railroad company for injuries sustained at a crossing, where there was evidence that the crossing was more than ordinarily dangerous, an instruction that if the jury believed that, because of the proximity of the crossing to a city and the amount of travel thereon and the obstruction of the view of the railroad, it was unusually or exceptionally dangerous, and further believed it was necessary to make travel over the same reasonably safe to have a flagman there or to reduce the speed of its trains, or to use some other reasonably sufficient means to give timely and reasonably sufficient warning of the approach of trains, the company was negligent if it failed to adopt such precautions, fairly presents the law of the case, though it would perhaps be more in harmony with the current of authority not to point out in the instruction the particular means to be employed by the company in exercising the degree of care required, but rather to inform them that if, on account of the dangerous character of the crossing and the amount of travel thereon, the statutory signals did not afford reasonably sufficient warning, then such other means as the evidence showed might be and were usually employed by railroads at dangerous crossings should be used, as in the exercise of a reasonable judgment might be considered necessary.

Same—Right of Action—Horse Running into Engine.—In an action against a railway company for personal injuries sustained at a crossing, if the injuries were caused by the fact that plaintiff's horse became frightened and ran into the train, the company is not liable.

Same—Duty of Railroad Company—Safeguards.—The care required of a company to provide safeguards at a crossing must be commensurate with the danger, and where it has created an extraordinary danger it is required to exercise extraordinary care; but it is not required by the law that the means adopted should prove effective.

Appeal—Review—Verdicts—Amount of Recovery.—The Court of Appeals has not and could not lay down any fixed rule as to the amount of damages in personal injury actions, and it can interfere only when a verdict is glaringly excessive and appears at first blush to have resulted from passion or prejudice; but the power to interfere should be exercised sparingly and only in extreme cases.

Damages—Personal Injuries—Excessive Damages.—The plaintiff in an action for personal injuries was a country school teacher 22 years of age. She was confined to her bed about five weeks, being able to move only one hand. Her collar bone was broken, her elbow and wrist sprained, a rib broken, her knee severely injured, and the

bones in one foot broken. The attending physician testified that the injury to her foot was permanent, and that she would always limp and be limited in her ability to walk, though she might not always require a crutch, and possibly not a cane, but he thought the knee would be all right in time. Held, that a verdict for $8,500 would not be disturbed as excessive.

Appeal from Circuit Court, Scott County.
"Not to be officially reported."

Action by Reba Champ against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Victor F. Bradley & Son, Galvin & Galvin, and *John Galvin,* for appellant.

Robert Harding, J. F. Askew, Emmett Puryear, and *Greene & Van Winkle,* for appellee.

CARROLL, J. The appellee resides in the city of Georgetown and at the time she received the injuries complained of was teaching school in the country, and went from her home each morning, returning in the afternoon. In going to and from the school, she traveled the Lemon's Mill turnpike, that crossed the tracks of the appellant railroad a few feet south of the corporate limits of the city. The crossing is about 1800 feet from the depot, and some of the side tracks connected with the yard of the company that lay between the crossing and the depot extended south of the crossing. The travel over this trunpike was very heavy; so much so, some of the witnesses testified, that there was always a vehicle in sight. About 200 feet south of the crossing the railroad track enters a deep cut, at a point where there is a sharp curve in the track; the result being that a train coming from the south cannot well be seen by a traveler approaching the crossing until he arrives within a few feet of the track, and not then until it has emerged from the cut. Recognizing the dangerous locality of this crossing, the company placed there an electric crossing bell, intended to be rung automatically by approaching trains, for the purpose of warning travelers that a train was coming; but this crossing bell was so adjusted or arranged that a car or train standing on the track would cause it to ring the same as a moving one. In consequence of this, and the proximity of the depot and yards, which were within the circuit that caused the bell to ring, and the number of trains and cars usually standing therein, it was ringing almost continuously; and persons who traveled this pike frequently, knowing this fact, gave little heed to the ringing of this bell, as it was as often made to ring by trains or cars standing in the yards as by moving trains. In close proximity to the crossing the railroad company had also a signal post with a green flag attached thereto in the daytime, to warn engineers of the location

of the yards and caution them to run their trains at a slow rate of speed and have them under control. Appellee, about 4 o'clock in the afternoon of February 5, 1906, was on her way home from school, riding alone in a buggy, and driving a gentle family horse. As she approached the track she heard the bell ringing; but, knowing that it frequently rung when there was no train approaching, she drove within a few feet of the track, and after looking in each direction, without seeing or hearing a train, proceeded to cross, when her horse was struck by a north-bound passenger train running 40 miles an hour. In the collision the buggy was smashed into pieces, the horse killed, and appellee severely and permanently injured. In this action to recover damages she obtained judgment for $8,500, to reverse which this appeal is prosecuted.

It is contended that the verdict is contrary to the evidence, that the plaintiff was guilty of contributory negligence, that the instructions were erroneous, and the damages excessive. There is no conflict in the evidence respecting the speed of the train. Whether the bell was rung or whistle sounded, in compliance with the statute, is the subject of much contradictory evidence; and there is also serious dispute as to whether the horse was struck by the front of the engine, or ran into the side of it. There was testimony for appellant to the effect that the horse as it approached the track became frightened and ran into the engine, being first struck by the side of it; and in support of this theory attention is called to the fact that the air drum on the engine, immediately under the seat of the engineer, was knocked off, and there was no indication, by marks or otherwise, on the front of the engine, that the horse had been struck by it, and also to statements made by appellee, after she had been carried to the railroad depot, and a few minutes after the accident, when it is said she stated that the horse became frightened, unmanageable, and ran into the train. On the other hand, appellee's statement is that the horse at the time of the collision was going in a slow trot, and was hit by the engine as he crossed the track; and her evidence is circumstantially supported by the fact that the horse was thrown about 70 feet from the crossing, the buggy 30 or 40 feet, and appellee some 25 feet. The statements purporting to have been made by her, considering her condition, which will be more particularly described hereafter, and the circumstances under which they were made, are not entitled to much weight.

It is argued that the admitted fact that appellee, as she approached the crossing, heard the bell ringing, was sufficient and reasonable notice to her that a train was approaching, and that in attempting to cross the track in the face of this warning she was guilty of such contributory negligence as should prevent a recovery. It is practically conceded that this bell frequently rang, and for a considerable length of time, when no train was ap-

proaching the crossing. This being true, the ringing of the bell was not notice that a moving train was near the crossing. The conditions under which this bell rang were known to appellee, who also knew that no regular train was due at that time; and she did not stop in obedience to its ringing, but, as she came near the track, looked in both directions, and did not see or hear any train. Although the bell was ringing, her attempt to cross the track under the circumstances was not such contributory negligence as would authorize either the jury or the court to disregard her claim for damages or refuse to allow a judgment in her behalf to stand. The ringing of the bell was a circumstance to be considered by the jury in connection with other evidence tending to show that the company had provided a sufficient warning of approaching trains and that appellee was not exercising ordinary care for her own safety, and that her negligence contributed, if it did not bring about, the injury she complains of; but this is the only effect the ringing of the bell can have. It must be remembered that there is no law requiring the erection of these bells, and the company in setting them up cannot excuse itself for the failure to give the signals required by the statute, or from taking such other precautions as the conditions may demand. We have no doubt that a bell properly equipped at a crossing is a useful contrivance when sufficiently maintained, and serves to warn passengers of the approach of trains; but, as the statute requires that the engine bell shall be rung or whistle sounded at country crossings as notice to travelers on the highway, this statutory duty is imperative in cases like this, and the failure to comply with it is negligence on the part of the company, notwithstanding it may have adopted other means and methods of warning less effective than gates or flagmen.

Appellee was not required, under the rule prevailing in this state, to stop, look, and listen, but only to observe ordinary care to note the approach of a train; and according to her statement she did exercise this degree of care, and even more than the law required, by coming to the track at a slow gait and looking up and down it before attempting to cross. That the crossing, in view of the heavy travel on the road and the natural obstructions that prevent persons from seeing approaching trains, was exceptionally dangerous, there can be little doubt. And although it may be conceded, notwithstanding the cautionary signal erected by the company to warn engineers that they were entering the yards, that trains might run at a high rate of speed, it was a question for the jury to say whether or not, under all the circumstances proven in the case, the safety of the traveling public did not require that exceptional means and other than the statutory signals should be taken to avoid injury to persons using the highway. At many crossings, ringing the bell and sounding the whistle in compliance with the statute is not sufficient; and when a cross-

ing is unusually dangerous the company must employ such means as, considering its character, are reasonably necessary to warn travelers of the approach of trains. This duty may require the presence of a flagman; and, when a flagman is necessary, the company cannot excuse itself for the failure to provide one upon the ground that the Railroad Commission had not required this precaution. C. & O. Ry. Co. *v.* Gunter, 108 Ky. 362, 57 L. R. A. 266; L., H. & St. L. Ry. Co. *v.* Lyon, 58 S. W. 434, 22 Ky. Law Rep. 544.

In the numerous cases involving crossing accidents that have come before this court, the central idea in all of them is that the company must use such care and precautions for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection. What this degree of care is must depend upon the facts of each case, and is a question for the jury. At one crossing ringing the bell and sounding the whistle might be amply sufficient; at another, it would be wholly inadequate, and a flagman or other safety device be necessary. This does not necessarily mean that the speed of trains must be slackened, as no rate of speed at ordinary crossings is usually negligence; but at exceptionally dangerous crossings, if the company does not choose to have a flagman or other safety device, and the statutory signals are not sufficient, the speed of the train must be so regulated as not to unnecessarily imperil the safety of persons using the highway. The duty of observing such decree of care as the situation and surroundings of the crossing may reasonably demand to prevent accidents is not alone imposed on the company, but applies as well to the traveler, who must use such care as might usually be expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way. In short, the obligations to avoid injury and accident are reciprocal, and must be commensurate with the danger. Thompson on Negligence, §§ 1535, 1553.

Keeping in mind these general rules, that have been frequently applied by this court, as in L. & N. R. Co. *v.* Cummins, 111 Ky. 333, 63 S. W. 594, Southern Ry. Co. *v.* Barbour, 51 S. W. 159, 21 Ky. Law Rep. 226, C. & O. Ry. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527, and L., C. & L. Ry. Co. *v.* Goetz, 79 Ky. 443, 42 Am. Rep. 227, the real question in this case is whether or not the instructions imposed upon the company a higher degree of care than was necessary at this crossing, and failed to exact from appellee a corresponding measure for her own safety. The jury were told in substance that if they believed from the evidence that, because of the proximity of the crossing to the city of Georgetown, and the amount of travel thereon, and the obstruction of the view of the railroad, it was unusually or exceptionally dangerous, and further believed it was necessary, to make travel over the same reasonably safe, to have a flagman there, or to reduce the

speed of its train, or to use some other reasonably sufficient means to give timely and reasonably sufficient warning of the approach of trains, it was guilty of negligence if it failed to adopt these precautions. They were also instructed that it was the duty of appellee, in approaching the crossing, to exercise ordinary care and prudence to ascertain whether or not a train was approaching, and if she knew, or by the exercise of ordinary care and prudence could have known, of the approach of a train, to stop and allow it to pass before attempting to cross, and if she failed to exercise this measure of care they should find for the company. They were further told that under the same conditions and circumstances the law requires that each party shall exercise the same degree of care and prudence, and also that, if her injuries were caused by the fact that her horse became frightened and ran into the train, the company was not liable.

We think these instructions fairly presented the law of the case. The crossing being exceptionally dangerous, it was the manifest duty of the company, as repeatedly held by this court, to use such means as were reasonably sufficient to afford reasonable protection to travelers. It would be perhaps more in harmony with the current of authority not to point out in an instruction the particular means to be employed by the company in exercising the degree of care required at country crossings, but rather to inform them that if, on account of the dangerous character of the crossing and the amount of travel thereon, the statutory signals did not afford reasonably sufficient warning, then such other means as the evidence showed might be and were usually employed by railroads at dangerous crossings should be used, as in the exercise of a reasonable judgment might be considered necessary. L. & N. R. Co. v. Lucas, 99 S. W. 959, 30 Ky. Law Rep. 359. As said in C. & O. Ry. Co. v. Gunter, *supra*: "The company was required only to use such means to give warning of the approach of trains as, considering the character of the crossing, were reasonably sufficient to warn travelers of the approach of trains, and the jury are the judges of the reasonable sufficiency of the means actually employed. Whether the means employed were reasonably sufficient under the circumstances of this case, and considering the nature of the crossing and the physical conformation of the country surrounding it—that is, whether they were such as an ordinarily prudent person operating a railroad would have adopted under like circumstances—was a question for the jury to decide under proper instructions. It is not required by the law that the means adopted should prove effective. The care required of the company must be commensurate with the danger. Where it has created an extraordinary danger, it is required to exercise extraordinary care. What is due in the particular case must depend on the existing state of circumstances at the time of injury, and is a question for

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the jury to decide"—although in Newport News & Mississippi Valley R. Co. *v.* Stuart's Adm'r, 99 Ky. 496, 36 S. W. 528, in which the facts were very similar to those in the case at bar, an instruction requiring the company to keep a flagman, if reasonably necessary to avoid injury to travelers, was approved.

It is further insisted that the damages awarded were excessive. The sum allowed is large, but, considering the nature and extent of the injuries received and the age and sex of appellee, we are not prepared to say that it is so excessive as to authorize us to interfere with the finding of the jury. This court has not attempted to, and could not, lay down any fixed rule upon this subject. As said in L. & N. R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706: "We are not acting as a jury, and it is only when glaringly excessive and appearing at first blush to have resulted from passion or prejudice that we can interfere. The power should be sparingly exercised, and only in extreme cases. This is the policy of the law, reasonably and necessarily so." Appellee was confined to her bed about five weeks, without being able to move only one hand. Her collar bone was broken, her elbow and wrist sprained, a rib broken, her knee severely injured, and the bones in one foot broken. The attending physician testified that the injury to her foot was permanent, and that she would always limp, and be limited in her ability to walk, although she might not always require a crutch, and possibly not a cane, but that he thought in time the knee would be all right. Aside from the excruciating mental and physical suffering endured by appellee, it is an irreparable misfortune for a young lady, 22 years of age, to be so injured as that she must be a cripple and limp through life. "Money is an inadequate recompense for injury, pain, and suffering; but the law cannot offer any other redress, and, as there is no criterion of damages by which to measure in dollars and cents the amount of recovery, it has wisely been left to the judgment and discretion of a properly instructed jury, and their finding, when it appears to be supported by evidence, and is not grossly excessive, will not be disturbed." Stagg *v.* Brightwell, 92 S. W. 8, 28 Ky. Law Rep. 1220.

Finding no prejudicial error in the record, the judgment is affirmed.

Note.

FLAGMEN AT CROSSINGS—DUTIES AND LIABILITIES OF RAILROAD COMPANIES.

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Crossings—Care Required of Highway Traveler as Affected by Fact That Safety Gates Are Open.—See extensive note, 14 R. R. R. 674, 37 Am. & Eng. R. Cas., N. S., 674; foot-notes appended to Shafer *v.* Lehigh Valley R. Co. (N. J.), 25 R. R. R. 34, 48 Am. & Eng. R. Cas., N. S., 34.

I. DUTY TO STATION AND KEEP FLAGMAN AT CROSSING.

A. ABSENCE OF STATUTE OR ORDINANCE REQUIRING.

1. General Rule.

In the absence of a statute or ordinance requiring such precaution, a railroad company is not, as a general rule, under any obligation to station flagmen at highway crossing.

United States.—Kowalski *v.* Chicago G. W. R. Co., 84 Fed. Rep. 586; Vallance *v.* Boston & A. R. Co., 55 Fed. Rep. 364.

California.—Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480.

Delaware.—Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123.

Illinois.—Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Lake Shore, etc., R. Co. *v.* Foster, 74 Ill. App. 387; Peoria, etc., R. Co. *v.* Herman, 39 Ill. App. 287.

Indiana.—Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659.

Maryland.—Maryland Cent. R. Co. *v.* Newbeur, 62 Md. 391, 19 Am.

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& Eng. R. Cas. 261; Northern Cent. R. Co. *v.* Medairy (Md.), 7 Am. & Eng. R. Cas., N. S., 526, 37 Atl. 796; State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

Massachusetts.—Bailey *v.* New Haven, etc., Co., 107 Mass. 496; Commonwealth *v.* Boston & W. R. Corp., 101 Mass. 201.

Michigan.—Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. 306; Freeman *v.* Duluth, etc., Ry. Co., 74 Mich. 86, 41 N. W. 872; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216; Willet *v.* Michigan Cent. R. Co., 114 Mich. 411, 72 N. W. 260.

Missouri.—Welsch *v.* Hannibal, etc., R. Co., 72 Mo. 541, 6 Am. & Eng. R. Cas. 75, 37 Am. Rep. 440.

New Hampshire.—Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209.

New Jersey.—Delaware, etc., R. Co. *v.* East Orange, 41 N. J. L. (12 Vr.) 127; Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. (7 Vr.) 531; Siracusa *v.* Atlantic City R. Co., 68 N. J. L. (39 Vr.) 446, 53 Atl. 547; Telfer *v.* Northern R. Co., 30 N. J. L. (1 Vr.) 188.

New York.—Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Case *v.* New York Cent. & H. R. R., 75 Hun 527, 27 N. Y. Supp. 496; Cohn *v.* New York Cent., etc., R. Co., 6 N. Y. App. Div. 196; Culhane *v.* New York Cent., etc., Co., 60 N. Y. 133; Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Ernst *v.* Hudson River R. Co., 39 N. Y. 61; Finklestein *v.* New York Cent., etc., R. Co., 41 Hun (N. Y.) 34; Heaney *v.* Long Island R. Co., 9 N. Y. St. Rep. 707; Houghkirk *v.* Delaware, etc., Canal Co., 92 N. Y. 219; Kissenger *v.* New York & H. R. Co., 56 N. Y. 538; McCallum *v.* Long Island R. Co., 38 Hun (N. Y.) 569; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417, 423; McGrath *v.* New York Cent., etc., R. Co., 59 N. Y. 468; Martin *v.* New York Cent., etc., R. Co., 20 N. Y. Misc. Rep. 363; Pakalinsky *v.* New York Cent., etc., R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451.

North Carolina.—Bradley *v.* Ohio River, etc., R. Co., 126 N. Car. 735.

Ohio.—Cleveland, etc., R. Co. *v.* Richardson, 10 Ohio Civ. Ct. Dec. 326; Lake Shore, etc., Ry. Co. *v.* Gaffney, 9 Ohio Cir. Ct. R. 32.

Pennsylvania.—Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. 610, 6 Atl. 238; Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405; Seifried *v.* Pennsylvania R. Co., 206 Pa. St. 399.

Rhode Island.—McGoran *v.* New York, etc., R. Co., 25 R. I. 387, 9 R. R. R. 367, 32 Am. & Eng. R. Cas., N. S., 367, 55 Atl. 929.

Texas.—Central Texas, etc., R. Co. *v.* Gibson (Tex. Civ. App.), 83 S. W. 862; International, etc., R. Co. *v.* Jones (Tex. Civ. App.), 60 S. W. 978; Missouri, etc., R. Co. *v.* Magee (Tex. Civ. App.), 49 S. W. 156.

Utah.—Christensen *v.* Oregon Short Line R. Co. (Utah), 80 Pac. 746.

2. Dangerous Crossings.

But, even in the absence of an ordinance or statute requiring a railroad company to station a flagman at a certain crossing of its road, if the character of the crossing or its surroundings, the extent of its use by the public, or other circumstances, constitute it such a dangerous crossing that ordinary prudence requires the railroad to station a flagman there to prevent collisions between trains and highway travelers, its failure to do so may be negligence rendering it liable for injuries to person or property.

United States.—Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 55 Am. & Eng. R. Cas. 159; Kowalski *v.* Chicago G. W.

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R. Co., 84 Fed. Rep. 586; Lapsley *v.* Union Pac. R. Co., 50 Fed. Rep. 172.

Illinois.—Baltimore & O. R. Co. *v.* Stanley, 54 Ill. App. 215; Chicago, etc., R. Co. *v.* Lane, 30 Ill. App. 437; Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127, 17 N. E. 1; Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399.

Kentucky.—Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441; Chesapeake, etc., R. Co. *v.* Gunter, 108 Ky. 362, 56 S. W. 527; Louisville & N. R. Co. *v.* Cummins' Adm'r, 111 Ky. 333, 6 S. W. 594; Newport News, etc., Co. *v.* Stewart, 99 Ky. 496, 36 S. W. 528.

Maine.—Webb *v.* Portland, etc., R. Co., 57 Me. 117.

Massachusetts.—Commonwealth *v.* Boston, etc., R. Corp., 101 Mass. 201; Eaton *v.* Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; Hubbard *v.* Boston & A. R. Co., 162 Mass. 132, 38 N. E. 366.

Michigan.—Freeman *v.* Duluth, etc., R. Co., 74 Mich. 86, 41 N. W. 872; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 166.

Missouri.—Welsch *v.* Hannibal, etc., R. Co., 72 Mo. 451, 6 Am. & Eng. R. Cas. 75, 37 Am. Rep. 440.

New Jersey.—Delaware, etc., R. Co. *v.* Shelton, 55 N. J. L. (26 Vr.) 342, 26 Atl. 957; Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. (9 Vr.) 525; New Jersey R., etc., Co. *v.* West, 32 N. J. L. (3 Vr.) 91; Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. (7 Vr.) 531.

New York.—McSorley *v.* New York Cent., etc., R. Co., 64 N. Y. App. Div. 267.

Pennsylvania.—Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238; Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405; Reeves *v.* Delaware, L. & W. R. Co., 30 Pa. St. 454.

Texas.—Central Texas, etc., R. Co. *v.* Gibson (Tex. Civ. App.), 79 S. W. 351; Missouri, etc., R. Co. *v.* Magee, 92 Tex. 616, 15 Am. & Eng. R. Cas., N. S., 186, 50 S. W. 1013.

Wisconsin.—Kinney *v.* Crocker, 18 Wis. 74.

In the absence of a statutory requirement, the question whether a railroad company should have a flagman or gates at a crossing depends upon the circumstances, such as the amount of travel over the crossing, the obstructions to view, etc., and is a matter of fact to be determined by the jury. So held in Lapsley *v.* Union Pac. R. Co., 50 Fed. Rep. 172.

Public Road Crossings.—The common law does not impose the duty on a railroad company to station persons at every crossing of a public road to warn travelers of approaching trains. So held in State *v.* Philadelphia, etc., R. Co., 47 Md. 76.

Possibility of Seeing Train in Time—Duty to Look.—In Stubley *v.* London & N. W. Ry. Co. (Eng.), 1 Exch. 13, Bramwell, B, said: "Need there be any one to warn persons of a train, which they can see so far off, that if they only take the trouble to look out for it, it cannot overtake them in crossing * * * "If such a precaution is necessary here, it must also be used everywhere; and the argument would show that on every canal, every railway in the Kingdom, means must be taken to warn people against the consequences of their own folly."

Opinion of Jury as to Necessity of Such Precaution.—The common law does not require a railroad company to maintain a flagman at every street or road crossing, where a jury may be of opinion that the travel is so great that ordinary prudence requires such precaution, for the purpose of keeping travelers off such crossing, when trains are passing over it. So held in Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9.

Duty in All Cases to Provide Flagman—Erroneous Instruction.—In

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an action for personal injuries sustained in a collision with a railroad train, it was error to instruct the jury that if the view of the track was obstructed by the act of the company, it was not enough to show that the train bell was rung or its whistle sounded; that it was the duty of the trainmen also to have slowed up as they approached the crossing and to have seen that the track was clear; and that, in order to have been assured that the track was clear, it was the duty of the company to have stationed a flagman or watchman; as such instruction invades the province of the jury, in determining whether there was negligence, and as establishing the principle that it was the duty of the company in all cases to provide a flagman. So held in Carraher *v.* San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480.

Common Prudence.—The Michigan statute charges the Railroad Commissioner with the duty of determining the necessity of maintaining a flagman upon any particular street crossing of a railroad, and his absence is of itself no evidence of negligence upon the part of the railroad company, but it must appear that the circumstances at the crossings are such that common prudence would dictate that the company should place a flagman, or his equivalent, at such crossing. So held in Freeman *v.* Duluth, etc., Ry. Co., 74 Mich. 86, 41 N. W. 872.

Required by Ordinary Prudence.—If ordinary prudence requires a railroad company to keep a flagman at a certain crossing, a failure to do so is negligence, although it is not required by statute. So held in Missouri, etc., Ry. Co. *v.* Magee, 92 Tex. 616, 15 Am. & Eng. R. Cas., N. S., 186, 50 S. W. 1013.

Street Crossing—Given Hour in the Day.—Whether the failure of a railroad company to keep a flagman on duty at a street crossing in a city, over which its road passes, at a given hour in the day, constitutes negligence, is a question to be determined from a consideration of all the circumstances of the case in question. So held in Annaker *v.* Chicago, etc., Ry. Co., 81 Iowa 267, 47 N. W. 68.

Grade Crossing in City Suburbs Used by Three Railway Systems.—In Baltimore & O. R. Co. *v.* Stanley, 54 Ill. App. 215, it is held that it is gross and wanton negligence to operate a railroad without any guard or protection, by means of a flagman or otherwise, to a person attempting to use the crossing at a place in the suburbs of a populous city, where a street is crossed at grade by six railroad tracks used by three great railway systems.

Traveler Prevented by Character of Crossing from Avoiding Collision.—In Louisville & N. R. Co. *v.* Hackman (Ky.), 30 S. W. 407, it was held that it was not error to charge the jury, that, if they found plaintiff, on account of the dangerous character of the crossing, could not have avoided the collision between his wagon and a train by the exercise of ordinary care, then defendant's failure to station some one at the crossing to give warning of approaching trains was negligence.

Crossing Near Town—Obstructions to Sight and Hearing.—In Newport News & M. V. Co. *v.* Stuart's Adm'r, 99 Ky. 496, 36 S. W. 528, it is held that when a crossing is near a populous town, and must be crossed by a large number of people going to and from the town, both on horseback and in vehicles, and the conformation of the surrounding county is such that one cannot see trains approaching from one direction until within fifteen or twenty feet of the track, and when, under certain conditions, which are not infrequent, the approach of the train or its whistle cannot be heard, the railroad should be required to have a flagman at that point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning them.

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Unnecessarily Dangerous Crossing.—The obligation to keep a flagman where a railroad intersects a public highway may become due by reason of the railroad company constructing its road so as to make the crossing or use of the highway unnecessarily dangerous. So held in Pennsylvania R. Co. *v.* Matthews, 36 N. J. L. (7 Vr.) 531.

Populous Neighborhood—View of Tracks Obstructed—Narrow Escapes.—In Central Texas, etc., Ry. Co. *v.* Gibson (Tex. Civ. App.), 79 S. W. 351, it appeared that defendant's railroad track crossed a street in a populous neighborhood, where a view of the track on each side was obstructed until within 25 feet of the track. And a witness testified that he had seen many narrow escapes there. It was held that the evidence warranted an instruction that if the crossing was peculiarly dangerous, and a person of ordinary care would have kept a flagman at the crossing, and the railroad failed to keep a flagman there, the jury would find for plaintiff, who had been injured by a train at such crossing.

Tracks in Street Used in Switching.—Where a company uses its tracks across a generally traveled street in a town or city in switching operations it is bound to use care proportioned to the increased danger arising from such use of its tracks, to avoid injury to persons using the crossing, and should, therefore, maintain a flagman, or gates or gateman, at such crossing, or adopt other equally adequate precautions for that purpose. So held in Cleveland, etc., Ry. Co. *v.* Schneider, 45 Ohio St. 678.

Crossings Where Trains Are Run Faster than Customary.—Failure to maintain a flagman at a crossing where trains are run faster, or in other respects differently from what would otherwise be permissible or consistent with proper care, may be evidence of negligence to go to the jury. So held in Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9.

Country Crossing—Approach Partially Concealed by Embankments.—But a railroad is not, as matter of law, required to station a flagman at a road crossing in the country because of the approach to it being partially concealed by embankments or otherwise. So held in Haas *v.* Grand Rapids & Ind. R. Co., 47 Mich. 401, 11 N. W. 216.

In this case it is said in the opinion: "Before we could say that the neglect to station a flagman at its highway crossing in the county was culpable fault, it should be made to appear that the danger was altogether exceptional, that there was something in the case which rendered ordinary care on the part of the traveler an insufficient protection against injury, and therefore made the assumption of this burden on the part of the railroad company, of the employment of a flagman, a matter of common duty for the safety of others."

Number of Persons Using Crossing—Absence of Evidence of.—Nor can the failure of a railroad company to maintain a flagman at a crossing be adjudged negligence, where there is no evidence as to the number of people who habitually use the crossing. So held in Hutcherson *v.* Louisville & N. R. Co. (Ky.), 52 S. W. 955, 15 Am. & Eng. R. Cas., N. S., 846.

Trains Easily Seen in Time—Negligence—Insufficiency of Evidence.—In Commonwealth *v.* Boston & W. R. Corp., 101 Mass. 201, it appears that daily twenty railroad trains, and about as many vehicles on a highway, passed over a place where the railroad crossed the highway at grade, but was in full view from the highway at any point within a hundred and fifty feet of the crossing, and where the public authorities never required the establishment of a gate, station agent or flagman, although the crossing had existed for many

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years. It was held that evidence of such facts was insufficient to warrant a finding that the railroad was guilty of negligence in omitting to provide any such safeguard.

3. Absence or Presence of Flagman to Be Considered upon Question of Negligence in Operating Train.

But whether or not a railroad company is negligent in failing to station a flagman, not required by statute or ordinace, at a crossing, it is generally recognized as a rule of the common law that the presence or absence of a flagman may be shown as bearing upon the question whether, under all the circumstances of the accident in question, the train inflicting the injury complained of was operated properly.

Illinois.—Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Chicago & I. R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513; Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127, 17 N. E. 1; Lake Shore, etc., Ry. Co. *v.* Foster, 74 Ill. App. 387; Peoria, etc., R. Co. *v.* Harman, 39 Ill. App. 287.

Indiana.—Pittsburgh, etc., R. Co. *v.* Yundt, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502, 41 Am. Rep. 580.

Iowa.—Hart *v.* Chicago, etc., R. Co., 56 Iowa 166, 7 N. W. 9, 9 N. W. 116; Pratt *v.* Chicago, etc., R. Co., 107 Iowa 287, 77 N. W. 1064; Tierney *v.* Chicago, etc., Ry. Co., 84 Iowa 641, 51 N. W. 175.

Kansas.—Chicago, etc., R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 1126; Kansas Pac. R. Co. *v.* Richardson, 25 Kan. 391, 6 Am. & Eng. R. Cas. 96.

Maine.—Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 247.

Massachusetts.—Eaton *v.* Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183.

Missouri.—Montgomery *v.* Missouri Pac. R. Co., 181 Mo. 477, 11 R. R. R. 274, 34 Am. & Eng. R. Cas., N. S., 274, 79 S. W. 930.

New York.—Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 49; Brown *v.* Rome, etc., R. Co., 121 N. Y. 669, 24 N. E. 1094; Casey *v.* New York Cent. R. Co., 78 N. Y. 518; Coyle *v.* Long Island R. Co. (N. Y.), 33 Hun 37; Crawford *v.* Delaware, etc., R. Co., 55 N. Y. Sup. Ct. 50; Ernst *v.* Hudson River R. Co., 33 N. Y. 9; Grippen *v.* New York Cent. R. Co., 40 N. Y. 34, 41; Harrington *v.* Erie R. Co., 79 N. Y. App. Div. 26; Houghkirk *v.* Delaware, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370; McAuliffe *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 356; McCallum *v.* Long Island R. Co., 38 Hun 569; McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522; Palmer *v.* New York, etc., R. Co., 112 N. Y. 234, 19 N. E. 678; Reid *v.* New York, etc., R. Co., 44 N. Y. St. Rep. 688; St. John *v.* New York Cent., etc., R. Co., 165 N. Y. 241; Weber *v.* New York Cent., etc., R. Co., 58 N. Y. 451.

Ohio.—Lake Shore, etc., R. Co. *v.* Johnston, 25 Ohio Cir. Ct. Rep. 41.

Pennsylvania.—Seifried *v.* Pennsylvania R. Co., 206 Pa. St. 399.

Vermont.—Carrow *v.* Barre R. Co., 74 Vt. 176, 4 R R. R. 933, 27 Am. & Eng. R. Cas., N. S., 933, 52 Atl. 537.

Wisconsin.—Abbot *v.* Dwinnell, 74 Wis. 514, 43 N. W. 496; Burns *v.* North Chicago Rolling Mill Co., 65 Wis. 312, 27 N. W. 43; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. 237; Hoye *v.* Chicago, etc., R. Co., 67 Wis. 14, 29 N. W. 646.

In Hoye *v.* Chicago & N. W. Ry. Co., 67 Wis. 1, it is held that the presence or absence of a flagman at a railroad crossing may be shown, in connection with other facts and circumstances, upon the question of the negligence of the railroad company in moving a train over such crossing.

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In an action against a railroad to recover for personal injuries inflicted by a train at a grade crossing, evidence that there was no flagman at the crossing is admissible as part of the surrounding circumstances, although defendant was not bound to keep a flagman there. So held in Carrow *v.* Barre R. Co., 74 Vt. 166, 4 R. R. R. 933, 27 Am. & Eng. R. Cas., N. S., 933, 52 Atl. 537.

It is not negligence per se for a railroad company to fail to guard a crossing with a flagman or watchman. It is only one of the elements to be considered in determining whether the company was negligent on a particular occasion. So held in Seifried *v.* Pennsylvania R. Co., 206 Pa. St. 399.

Action Cannot Be Based upon Omission.—In Peoria, etc., Ry. Co. *v.* Harman, 39 Ill. App. 287, it is held that the failure of a railroad company to keep a flagman at a crossing is not negligence per se; and that an action cannot be directly based upon such an omission, but such an omission may be shown by way of specifications of the cause of negligence in running the train to the crossing.

Failure to Station Flagman—Question of Negligent Speed.—In Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. 238, it is said in the opinion: "The law does not designate the mode in which these precautions against injury on the part of the company (at crossings) are to be exercised, there is, it may be conceded, no common-law duty on the part of the company to station flagmen, or to maintain gates, at public grade crossings, unless, indeed, under the particular circumstances, the public safety cannot otherwise be reasonably secured; but the fact that flagmen are not stationed at such a crossing, and that gates are not there maintained, are matters proper to be considered, with other facts, in a given case, in determining the rate of speed which is reasonably consistent with the public safety."

Collision between Train and Wagon at Street Crossing—Absence of Flagman.—In an action to recover for injuries resulting from a collision between a train and a wagon at a street crossing, evidence that a flagman had always been kept at the crossing, and that he was absent at the time of the accident, was competent as bearing upon the question whether, under all the circumstances, defendant ran and managed its trains with the requisite care and prudence. So held in McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522.

Failure to Station Flagman—Evidence of Admissible as Bearing on Negligence Charged in Complaint.—In an action to recover for the death of one killed by a train at a crossing, though the complaint did not charge negligence in failing to keep a flagman at the crossing, or in failing to have gates there, it was proper to admit evidence as to the absence of a flagman or gates, as it appeared that the crossing was almost continuously used by the public, and there was evidence, as alleged in the complaint, that the train was running at excessive speed and without giving signals; the jury being instructed that the evidence of the absence of flagman and gates was admitted merely as bearing on the negligence charged in the complaint. So held in Christensen *v.* Oregon Short Line R. Co. (Utah), 80 Pac. 746.

In Kansas Pac. Ry. Co. *v.* Richardson, 25 Kan. 391, 6 Am. & Eng. R. Cas. 96, an action for personal injuries inflicted by a train at a crossing, it was averred in the petition that the injuries resulted from the negligence of the defendant railroad company in crossing a street with a train at a very dangerous and reckless rate of speed and without giving the proper signals, and that the view of the approach of the train was obstructed by cars, and by lumber piled near the

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road. It was held not error, under the allegations, for the trial court to permit plaintiff to prove that the railroad company had no flagman at the crossing, as one of the circumstances existing at the time and place of the accident.

Uncontrolled Cars "Kicked" over Street Crossings.—In Tierney *v.* Chicago, etc., Ry. Co., 84 Iowa 641, 51 N. W. 175, it appeared that the cars by which deceased was struck at a street crossing were being moved by their own momentum at the time, after a "kick" from a locomotive, with no one upon them to control them or give warning of their approach, and there was no flagman at the crossing. It was held that the question whether under all the circumstances of the case the railroad was negligent because of such facts was properly submitted to the jury.

Jury's Duty to Disregard Failure to Station Flagman—Instruction.—In an action for personal injuries inflicted by a train at a street crossing, where evidence of the absence of a crossing flagman has been properly admitted, and the court has instructed the jury that there was no absolute duty imposed on the company, by law, to keep a flagman at the crossing, and that omission to do so was not of itself negligence, it was not error in the court to decline to tell the jury they should entirely disregard such failure to maintain a flagman at the crossing, in passing upon the question whether the railroad company was negligent as charged in the declaration. So held in Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127, 17 N. E. 1.

4. Necessity of Flagman as Question for Jury.

Some authorities hold that in the absence of a municipal ordinance and an express statutory requirement on the subject, whether a railroad company is negligent in not maintaining a flagman at a crossing is a question of fact for the jury, to determine from the evidence of the circumstances in a particular case. Chicago, etc., R. Co. *v.* Perkins, 26 Ill. App. 67, 17 N. E. 1; Staal *v.* Grand Rapids & Ind. R. Co., 57 Mich. 239, 23 N. W. 796; Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 247; Webb *v.* Portland, etc., R. Co., 57 Me. 117; Hubbard *v.* Boston & A. R. Co., 162 Mass. 132, 38 N. E. 366; Omaha, etc., R. Co. *v.* Brady, 39 Neb. 27, 57 N. W. 267.

Whether reasonable prudence requires a railroad company to keep a flagman at a crossing that is especially dangerous is a question of fact for a jury. So held in Grand Trunk Ry Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 55 Am. & Eng. R. Cas. 159.

Abstract Instruction—Right to Give.—In Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 247, it is held that there may be extreme cases where a judge is justified in giving an absolute instruction upon the question of negligence in failing to station a flagman at a crossing, but generally it is a question for the jury.

Street Crossing in City.—In Bolinger *v.* St. Paul & D. R. Co., 36 Minn. 418, 31 N. W. 856, an action for the alleged negligent killing of plaintiff's intestate by defendant's train at a city street crossing, it is held that it was for the jury to determine whether the presence of a watchman, or other precautions not taken, were reasonably necessary for the safety of the public.

Highway Grade Crossing.—Whether persons of ordinary prudence, operating a railroad with full knowledge of the dangers of a certain level highway crossing, would guard against accidents by stationing a flagman there or slacken the speed of trains is a question of fact. So held in Huntress *v.* Boston & Maine R. Co., 66 N. H. 185, 34 Atl. 154.

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5. Question of Necessity of Flagman Not for Jury.

But there are other authorities holding that, where a railroad company is not expressly required by an ordinance or statute to station a flagman at a particular crossing, the question never is whether there should have been a flagman stationed there, but whether, in view of the presence or absence of a flagman at such crossing, the train was operated there with prudence or negligence. Siracusa *v.* Atlantic City R. Co., 68 N. J. L. 446, 53 Atl. 547; Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9; Buck *v.* Manhattan Ry. Co. (N. Y.), 15 Daly 276; Kakalinsky *v.* New York Cent., etc., Co., 82 N. Y. 425; Semel *v.* New York, etc., Co. (N. Y.), 9 Daly 321.

In McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522, it is said in the opinion: "The fact (of the presence or absence of a flagman) may be proved as one of the circumstances under which the train was moved, and by which the degree of care requisite in its handling and running may be affected, so that the question never is whether there should have been a flagman, or one ought to have been stationed at the crossing, but whether, in view of his presence or absence, the train was moved with prudence or negligence."

In Winchell *v.* Abbott, 77 Wis. 571, 46 N. W. 665, it is held that no weight could be given to a finding in the special verdict that the defendants' failure to have a flagman at the crossing, to warn plaintiff of the approach of the locomotive, was negligence, the jury not being competent to determine that question.

In Heddles *v.* Chicago & N. W. R. Co., 74 Wis. 239, 42 N. W. 237, it is held that a charge to the effect that though no statute or ordinance required a flagman to be kept or gate maintained at the crossing where the accident occurred, yet if the jury found that a flagman or gate was necessary to the safety of travelers on the street and would have prevented the injury in question, the failure to have such flagman or gate was a fact from which they would be authorized to find negligence on the part of the company, was erroneous, as the question submitted to the jury should have been whether, in view of the absence of flagman and gate, the engine was moved with prudence or negligence.

In Coyle *v.* Long Island R. Co. (N. Y.), 33 Hun 37, it is held, in an action for injuries sustained while crossing a railroad, that although the omission of the company to station a flagman at the crossing may be proved and considered by the jury in determining whether under all the circumstances of the case, including the absence of the flagman, reasonable care and prudence was exercised in running the train at the time of the accident, yet, it is error for the court to charge that if the jury finds that it was the duty of the company, under the circumstances of the case, to keep a flagman at the crossing, as a matter of precaution to warn those approaching it, its omission to perform that duty is negligence which may make it liable for the injuries sustained.

Caprice, Sympathy, or Prejudice of Jury.—In Beisiegel *v.* New York Cent. R. Co., 40 N. Y. 9, it is said in the opinion: "In this case the charge was erroneous in this. Instead of submitting to the jury the question whether, from the facts and circumstances of the case, the defendant had failed to exercise ordinary prudence and reasonable care amounting to negligence, they were instructed in substance, that the question was, whether St. Joseph street was such a populous portion of the city that it was due to the public safety that the company should keep a flagman at that point; and if the jury thought it was, then it was negligence to omit that duty. This was calculated to withdraw the attention of the jury from the real question (the neg-

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ligence of the defendant in respect to the particular transaction, under all the facts and circumstances attending it), and placing it upon a particular act, and the duty of the company to do that particular act. Whether there is negligence, depends upon the degree of care required and given in each particular case, irrespective of any particular mode. Whether the care was by a flagman, by gates, or by any other equivalent mode, is of no importance. If it were established as law that the omission of any particular act—which from the amount of travel at crossings, a jury might think required by the public safety—was negligence, a railroad company would never know when it was safe from that imputation. For, no matter how carefully it observed the requirements of the statute, or conducted itself in other respects, if it omitted any one act, which the caprice, or sympathy, or prejudice of a jury might think required for the public safety, the omission would constitute negligence, and subject it to all the consequences."

6. Custom.

Where a railroad has continuously kept a flagman at a certain crossing to protect highway travelers, so that the public have been trained to rely upon such custom, it may constitute actionable negligence on the part of the company to withdraw him.

United States.—Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 55 Am. & Eng. R. Cas. 159; Lapsley *v.* Union Pac. R. Co., 50 Fed. Rep. 172; Whelan *v.* New York, etc., R. Co., 38 Fed. Rep. 15.

Connecticut.—Dolph *v.* New York, etc., R. Co., 74 Conn. 538, 2 R. R. R. 35, 25 Am. & Eng. R. Cas., N. S., 35, 51 Atl. 525; Dundon *v.* New York, etc., R. Co., 67 Conn. 266, 34 Atl. 1041.

Delaware.—Martin *v.* Baltimore, etc., R. Co. (Del.), 2 Marv. 123.

Illinois.—St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197.

Indiana.—Pittsburg, etc., Ry. Co. *v.* Yundt, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502, 41 Am. Rep. 580.

Iowa.—Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68; Tierney *v.* Chicago, etc., R. Co., 84 Iowa 41, 51 N. W. 175.

Maine.—Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 247; Webb *v.* Portland, etc., R. Co., 57 Me. 117.

Massachusetts.—Eaton *v.* Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183.

Minnesota.—Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. 856.

Missouri.—Montgomery *v.* Missouri Pac. Ry. Co., 181 Mo. 477, 11 R. R. R. 274, 34 Am. & Eng. R. Cas., N. S., 274, 79 S. W. 930.

New York.—Casey *v.* New York Cent., etc., R. Co., 78 N. Y. 518; Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Ernst *v.* Hudson River R. Co., 39 N. Y. 61; Warner *v.* New York Cent. R. Co. (N. Y.), 45 Barb. 299.

Wisconsin.—Burns *v.* North Chicago Rolling Mill Co., 65 Wis. 312, 27 N. W. 43.

In Burns *v.* North Chicago Rolling Mill Co., 65 Wis. 312, 27 N. W. 43, it is said in the opinion: "When the compnay had usually kept a flagman at that crossing, those approaching it might well think that no train was near it if no flagman or his signal was seen. The traveler might in this way be lured into danger, when if no flagman had been kept there, he would not have looked for such a signal, but would have looked and listened for other signs of an approaching train. We cannot but approve of the authorities cited by the learned counsel for the respondent, which hold that the withdrawal of a flagman from a crossing where he is usually kept, to signal ap-

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proaching travelers, is negligence. Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 28 S. C., 39 N. Y. 61; Beisiegel *v.* N. Y. C. R. Co., 34 N. Y. 622; McGrath *v.* New York, etc., R. Co., 63 N. Y. 522, 523; Shearm. & Redf. on Neg. § 483."

Where a railroad company habitually maintains a watchman at a crossing, his absence when a person having knowledge of the custom is injured by collision with a train at such crossing is evidence of negligence on the part of the company. So held in Montgomery *v.* Missouri Pac. Ry. Co., 181 Mo. 477, 11 R. R. R. 274, 34 Am. & Eng. R. Cas., N. S., 274, 79 S. W. 930.

Where, by voluntary and continued practice on the part of the railroad company, it has become notoriously public that a flagman is placed at a certain crossing to give notice of the approach of trains, then to withdraw the flagman without notice may become an act of negligence on the part of the railroad, for which it will be liable. So held in Ernst *v.* Hudson River R. Co., 39 N. Y. 61.

Flagman Stationed for Railroad's Own Convenience.—A railroad company, for its own convenience, may place a flagman at a certain crossing, and by establishing a practice of that kind, they may make a law binding upon itself. So held in Ernst *v.* Hudson River R. Co., 39 N. Y. 61.

Bound to Exercise Reasonable Care.—Where a railroad company assumed the duty of protecting a crossing by a flagman, it was bound to do so with reasonable care; and the question whether the duty of placing a flagman there rested upon it was immaterial. So held in Wolcott *v.* New York, etc., R. Co., 68 N. J. L. 421, 5 R. R. R. 547, 28 Am. & Eng. R. Cas., N. S., 547, 53 Atl. 297.

Competent Flagman.—If the point where a railroad crosses a highway is a place of danger, so much so that the corporation has voluntarily undertaken the duty of keeping a flagman there, and has continued for several years, it is part of its duty to keep a fit person as flagman at such point, whose conduct will not be liable to mislead and deceive the public. So held in Warner *v.* New York Cent. R. Co. (N. Y.), 45 Barb. 299.

Accident at Street Crossing at Night—Four Tracks—Absence of Watchman—Speed in Violation of Ordinance—Gross Negligence.—In St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197, it appeared that a person was crossing a street in a city, after dark, in which there were four railroad tracks, upon which trains were passing at short intervals at all hours of the day, and just as he was stepping upon the farthest track in the direction he was going, he was struck by a train; that the railroad employed a watchman to warn persons of the approach of trains but that at the time of the accident in question, the watchman was absent from the crossing, and the train was running at a much higher rate of speed than was allowed by an ordinance of the city; and that it was a matter of doubt whether any crossing signal was given. It was held that under the circumstances the failure of the flagman to be present or the omission of any of the above mentioned precautions, would be gross negligence on the part of the railroad company.

Absence of Watchman—Gate Left Open and Fastened Back—Negligence—Question for Jury.—Where a railroad company has been in the habit of keeping a watchman at a highway crossing to open and close a gate at the approach of trains, it is a question for the jury whether the railroad is not negligent in leaving the gate open and fastened back without a watchman. So held in Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405.

Right to Rely on Absence of Flagman.—Where a railroad company has voluntarily maintained a flagman at a grade crossing for five

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years to warn people of the approach of trains not stopping at that point, one knowing that fact had the same right to rely on the absence of the flagman as indicative of safety as though he had been maintained by order of the railroad commissioners. So held in Dolph *v.* New York, etc., R. Co., 74 Conn. 538, 2 R. R. R. 35, 25 Am. & Eng. R. Cas., N. S., 35, 51 Atl. 525.

7. Negligence of Flagman Not Required by Law.

The negligence of a flagman stationed at a crossing by a railroad company, in performing or in failing to perform the usual duties of such position, may render the company liable for injuries occasioned thereby, though the company was under no legal obligation to station a flagman at such crossing. State *v.* Boston & M. R. Co., 80 Me. 430, 15 Atl. 36; Sweeny *v.* Old Colony & N. R. Co., 92 Mass. 368; Wolcott *v.* New York, etc., R. Co., 68 N. J. L. 421, 5 R. R. R. 547, 28 Am. & Eng. R. Cas. 547, 53 Atl. 297; Kissenger *v.* New York & H. R. Co., 56 N. Y. 538.

Even when it is not negligence for a railroad not to maintain a flagman at a crossing, yet if one is employed, his neglect to perform the usual and ordinary functions of the place may render the railroad liable. So held in Kissinger *v.* New York & H. R. Co., 56 N. Y. 538.

Private Crossing in City—Public Allowed to Use—Negligence in Signalling to Cross.—In Sweeney *v.* Old Colony & N. R. Co., 92 Mass. 368, it is held that if a railroad company has made a private crossing over their tracks, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness.

8. Flagman Required by Ordinary Prudence although Statute Prescribes Other Precautions.

Although neither an ordinance nor statute requires a flagman to be stationed at a certain railroad crossing, but does require certain other precautions to be observed there for the protection of the public when trains are operated there, such precautions may not be sufficient under the circumstances; and in such case it may be negligence on the part of the railroad company not to also station and keep a flagman at the crossing. Chicago, etc., R. Co. *v.* Perkins, 125 Ill. 127; Louisville & N. R. Co. *v.* Cummins' Admr., 111 Ky. 333, 63 S. W. 594; Webb *v.* Portland, etc., R. Co., 57 Me. 117; Guggenheim *v.* Lake Shore, etc., Ry. Co., 66 Mich. 150, 33 N. W. 166.

In Hubbard *v.* Boston & A. R. Co., 162 Mass. 132, 38 N. E. 366, it is said in the opinion: "It is well settled in this commonwealth that the requirements of the Pub. Sts. c. 112, §§ 163, 164, in regard to the erection of signboards and the sounding of the whistle and the ringing of the bell of locomotive engines at crossings, are not exclusive of other provisions for the protection of the public where these are not sufficient to provide reasonably for their safety, and that it is the duty of a railroad corporation to erect gates or station a flagman at a crossing if the security of the public reasonably requires it, even though no request in regard to it has been made by the mayor and alderman or selectmen, and no order by the county commissioners, under the provision of Pub. Sts. c. 112, § 166. Eaton *v.* Fitchburg Railroad, 129 Mass. 364, 2 Am. & Eng. R. Cas. 183, and cases cited.

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A similar rule prevails in other states. Richardson *v.* New York Central Railroad, 45 N. Y. 846; Pennsylvania Railroad Co. *v.* Matthews, 36 N. J. L. (7 Vr.) 531; Chicago, etc., Eastern Illinois Railroad *v.* Boggs, 101 Ind. 522, 23 Am. & Eng. R. Cas. 282, 51 Am. Rep. 781."

View Obstructed.—In Guggenheim *v.* Lake Shore, etc., Ry. Co., 66 Mich. 150, 33 N. W. 166, it is said in the opinion: "When a railroad company so obstructs its track, that its trains cannot be seen by those aproaching a crossing, and so that the signals required by statute, the bell and whistle, are not sufficient to warn the traveler, it is very clear, to my mind, that some additional warning must be given, and there are cases where a flagman would be necessary to acquit the company of negligence."

Statutory Precautions Exclusive.—But in Dyson *v.* New York, etc., R. Co. 57 Conn. 9, 17 Atl. 137, it is held that a statute which requires of railroad companies certain precautionary measures at highway crossings is exhaustive and defines the whole of their ordinary duties in such respect.

Adoption of Electric Bell at Crossing without Notice to County Commissioners—Failure to Station Flagman—Negligence—Statute.—Where a state statute empowers the commissioners of a county to require railroad companies to place either flagmen or a system of electric signal bells, or to erect safety gates, or change the grade where a crossing is regarded as dangerous, the railroad which has adopted, without notice from the commissioners, an electric signal bell at a crossing, will not be held negligent for failure to place a flagman there. So held in Northern Cent. Ry. Co. *v.* Mediary (Md.), 7 Am. & Eng. R. Cas., N. S., 526, 37 Atl. 796.

B. WHERE REQUIRED BY STATUTE OR ORDINANCE.

Violation of Statute or Ordinance Not Negligence Per Se.—Failure to comply with a statute or ordinance requiring a railroad company to station a flagman at a particular crossing, while not negligence per se, so as to render the compnay liable where the injury was in no way attributable to such failure, it may constitute actionable negligence. Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79; Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 6 Am. & Eng. R. Cas. 79, 36 Am. Rep. 88; McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522; Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300.

Failure to Comply with Ordinance Requiring Flagman—Negligence Not Connected with Injury—Instruction.—In Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 6 Am. & Eng. R. Cas. 79, 36 Am. Rep. 88, an action against a railroad company to recover for personal injuries inflicted by a train at crossing, through the alleged negligence of defendant, it was held error to instruct the jury that, if there was a city ordinance requiring defendant to keep a flagman at such crossing, "then the defendant could fail or neglect to comply with its requirements, without being guilty of negligence," if such negligence be not connected with the alleged injury.

Failure to Comply with Ordinance—Negligence—Question for Jury.—A violation or disregard of an ordinance requiring railroads to maintain flagmen at street crossings, while not conclusive proof of negligence, is evidence upon that subject to be submitted to the jury, in an action for injuries inflicted by a train at such a crossing. So held in McGrath *v.* New York Cent., etc., R. Co., 63 N. Y. 522.

Negligence Per Se—Failure to Comply with Ordinance.—But in Murray *v.* Missouri Pac. Ry. Co., 101 Mo. 236, 13 S. W. 817, it is held

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that the failure of a railroad company to comply with an ordinance requiring it to keep a flagman at a street crossing for the protection of the public is negligence per se.

II. MISCELLANEOUS.

1. Implied Power of City.

A municipal corporation has not the implied power to compel a railroad company to maintain, at a street crossing, a flagman to warn passers-by of the approach of trains. So held in Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118, 12 N. E. 445.

2. Authority of Town to Compel Railroad to Keep Flagman at Each Street Crossing—Statute.

A state statute gave the board of trustees of an incorporated town the exclusive control over the streets, alleys and highways and bridges within the corporate limits of such town, and authorized them to declare what should constitute a nuisance, and to prevent, abate, and remove the same, to regulate or prohibit the use of things tending to endanger persons or property, to prevent the interference with the free use of the streets and alleys of the town, and to establish such ordinances, not repugnant to the laws of the state, as might be necessary to carry into effect the laws of such powers. It was held that such statute did not authorize an ordinance to compel a railroad company to keep at its own expense a watchman, and erect and maintain a gate on each side of its track at each street crossing within the town limits. So held in Pittsburgh, etc., R. Co. *v.* Crown Point (Ind.), 6 Am. & Eng. R. Cas., N. S. 324.

3. Duty to Maintain Flagman at Grade Crossing over Highways Not Authorized by Railroad Commission—Statutes.

Under R. I. Gen. Laws 1896, c. 187, § 47, providing that every railroad corporation operating a railroad in the state shall cause a flagman to be placed where a railroad crosses a public highway, when, in the opinion of the town council, it is necessary for the public safety, and chapter 834, § 2, declaring that no highway shall be built across any railroad track at grade except by consent of the railroad commission, a railroad company is under no obligation to maintain a flagman at a grade crossing over a highway not authorized by the railroad commission, though the council has ordered that flagmen shall be stationed at all grade crossings within city limits. So held in McGoran *v.* New York, etc., R. Co., 25 R. I. 387, 9 R. R. R. 367, 32 Am. & Eng. R. Cas., N. S., 367, 55 Atl. 929.

4. Failure to Station Flagman—Negligence—Pleading.

In Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 22 Am. & Eng. R. Cas. 247, it is held that it need not be alleged in the declaration that the cause of the injury was the negligence of the railroad in not having a flagman at the crossing, in order to be permitted to show such omission as evidence of negligence, if none be required either by statutory or municipal regulation.

5. Flagman's Failure to Fully Perform His Duty to Child—Sufficiency of Evidence.

In an action to recover against a railroad for personal injuries sustained by a child at a grade crossing, where there was a gate consisting of a single bar under which the plaintiff could pass, there was

evidence tending to show that just before the accident the flagman lowered the gates while a train passed on the west bound track; that as the train was passing the child came to the crossing and, passing either under the gate or by the sidewalk, went up and stood by the flagman; that when the train passed she walked with him to the east track, where he stood, but she kept on as if to cross it; that he called her back, and she returned, and stood near, facing him; and that while thus situated an incoming train struck and injured her. It was held that the jury might infer that the flagman had not fully performed his duty to the child. Jones *v.* Harris, 18 Pa. St. 469.

6. Frightening Teams—Duties of Flagmen.

Proper care requires a railroad crossing flagman to give the driver of a team such warning of the approach of a train as will enable him to stop his team at a point where an ordinarily well-broken and gentle team would not become dangerously frightened, or where, if his horses were not ordinarily well-broken and gentle, he would have time to turn around and drive to a point of safety. Louisville & N. R. Co. *v.* Sights (Ky.), 89 S. W. 132.

7. Negligence of Flagman Sole Cause of Accident.

If a person approaching a crossing where there is a flagman does not discover the approach of an engine, and the flagman fails to give any warning, and such person is struck by the engine, and the accident is due solely to such failure on the part of the flagman, it is sufficient to render the railroad liable. So held in Kissenger *v.* New York & H. R. Co., 56 N. Y. 538.

8. View Obstructed—Knowledge of Absence of Flagman.

The fact that one about to pass over a railroad at a street crossing, when it is dark and foggy, knows that no flagman is stationed there at such hour, and his dependence, therefore, upon his own sight and hearing to discover the approach of trains will not excuse the railroad for its negligence in not keeping a flagman there at such time. So held in Annaker *v.* Chicago, etc., Ry. Co., 81 Iowa 267, 47 N. W. 68.

9. Speed Prohibited by Ordinance—Absence of Watchman and Headlight—Failure to Stop to Look for Trains.

In Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333, it appeared that the train which killed plaintiffs intestate approached the place of the accident, a grade crossing in a city, at a rate of speed prohibited by an ordinance; that no notice was given of its approach; that the headlight was extinguished; that the crossing watchman was not present to perform his duties; and that deceased passed along a much frequented street in approaching such crossing, where an ordinance required a watchman to be stationed to warn travelers, and there was no train due at the time. It was held that the railroad was guilty of negligence; and that the failure of deceased to stop to look for trains did not, as a matter of law, make a case of contributory negligence, so plain as to justify the court in withdrawing it from the consideration of the jury.

10. Persons Entitled to Protection of Statute or Ordinance.

There are authorities holding that an ordinance or statute requiring a flagman to be stationed at a railroad crossing is intended only for the protection of persons using or intending to use the crossing, and

Note

who reach it by means of the street or highway across which the railroad track is laid; and that noncompliance with such an ordinance or statute is not actionable negligence, for instance, with respect to persons who reach the crossing by using the railroad track as a foot-path.

Chicago, etc., Ry. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391, 19 Am. & Eng. R. Cas. 261; Matthews *v.* Philadelphia, etc., R. R., 161 Pa. St. 28, 28 Atl. 936; Carrow *v.* Barre R. Co., 74 Vt. 176, 4 R. R. R. 933, 27 Am. & Eng. R. Cas., N. S., 933, 52 Atl. 537; Schwartz *v.* Delaware, etc., R. Co. (Pa.), 16 R. R. R. 441, 39 Am. & Eng. R. Cas., N. S., 441.

Using Track as Footpath.—An ordinance requiring a railroad to keep a flagman at a street crossing, to give warning of the approach of trains, is not intended for the benefit of persons walking along the track and using it as a footpath; and the company owes persons so using its track no duty in respect to a flagman. So held in Chicago, etc., Ry. Co. *v.* Eininger, 114 Ill. 79, 29 N. E. 196.

Trespassers.—A railroad company is under no duty to keep a flagman at a crossing for the protection of trespassers on its track, but only for the benefit of those about to cross the track. So held in Roden *v.* Chicago, etc., R. Co., 133 Ill. 72, 24 N. E. 425.

Accident Not at Crossing—Absence of Watchman Not Connected with Cause of Accident.—In an action for the negligent death of one standing near a railroad right of way, caused by the derailment of a train, the fact that the flagman was absent from the crossing was immaterial where deceased was not on the crossing, and the absence of the watchman had nothing to do with his injuries. So held in Illinois Cent. R. Co. *v.* Watson's Adm'r (Ky.), 10 R. R. R. 27, 33 Am. & Eng. R. Cas., N. S., 27, 78 S. W. 175.

Person Climbing upon Train.—Failure of a railroad to perform the duty of maintaining a flagman at a railroad crossing is not actionable negligence with respect to a person injured while attempting at the crossing to climb upon one of the company's trains. So held in Chicago, etc., R. Co. *v.* Roath, 35 Ill. App. 349.

11. Duties and Liabilities of Company Using Railroad of Another Company.

Ordinance Not Applicable to Company Having Restricted License to Run Cars on Track.—In Lake Shore, etc., R. Co. *v.* Kaste, 11 Ill. App. 536, it is held that an ordinance requiring the stationing of flagmen at street crossings of a railroad has reference to the duty of the owners or lessees of the tracks; and that a failure to comply with such ordinance cannot be made the basis of a liability against a railroad company not owning or leasing the track, nor having any control over it, but having only a license to run its cars on the track subject to certain regulations.

Absence of Flagman Habitually Kept at Crossing—Liability of Company Using Railroad Track by Permission.—In McGrath *v.* New York, etc., R. Co., 63 N. Y. 522, it is held that where the law does not expressly require a flagman to be stationed at a railroad crossing, a company running its trains over the tracks of another is not liable for an injury at the crossing, merely because there was no flagman there at the time, though it was the custom of the company owning the track to keep a flagman there.

Gateman of Owner of Railroad as Employee of Another Company.—In Cleveland, etc., Ry. Co. *v.* Schneider, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334, 17 N. E. 321, it is held that a railroad company which, in operating a road with the owner of the same, under an

agreement to pay the latter a specified sum yearly, in excess of the amount to which it is entitled out of the joint earnings, for the use of its tracks and the cost of switching, uses the tracks at a crossing where gates and a gateman are maintained, is bound to the same care in the use thereof as the company owning the road, and should anticipate the reasonable effect of the gates, and the gatemen's conduct in their management, on persons using or about to use the crossing, and operate the road at that place with due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under those circumstances; and if it accepts the services of the gateman employed by the company owning the road, instead of employing gatemen of its own, they become its servants, for whose negligence it is responsible; and if it does not accept their services, its duty is to place competent gatemen at such crossing and is responsible for its omission to do so.

A. R. Y

TAYLOR *et al. v.* FLORIDA EAST COAST RY. CO.

(Supreme Court of Florida, Division A, Dec. 17, 1908.)

[45 So. Rep. 574.]

Specific Performance—Injunction—When Granted.—In a proceeding for the specific performance of a contract, a temporary injunction will not be granted, unless the allegations of the bill of complaint warrant a decree of specific performance, nor unless it also appears that an injunction is appropriate and just.

Injunction—Preliminary Injunction.—The granting or denying of a temporary injunction is largely within the discretion of the trial judge; but such discretion is controlled by established principles of equity. If the allegations of the bill are sufficient, and the evidence in support thereof is ample to warrant the granting of the temporary injunction, and no sufficient defense is made, an order denying an injunction will be reversed.

Carriers—Duties to Public.—Whether the duty a common carrier, a railroad corporation, owes to the public is materially and injuriously affected by the contract obligations of the corporation to individuals, cannot be arbitrarily determined by the corporation for itself.

Specific Performance—Contract of Railroad Company—Remedy in Damages.—Where a common carrier railroad corporation asks for and receives land upon which to construct its road, and as a consideration therefor promises to maintain a spur track and depot at a certain place upon lands given for that purpose, and the party giving the land, relying upon the promise of the corporation, incurs great expense in improving his property for use in connection with the advantages of the spur track and depot and the operation of trains

thereon, and the breach of the promise results in an injury that cannot be adequately compensated in damages, equity may enforce performance of the promise in the manner and to the extent agreed, at least in the absence of a proper showing of superior rights of the public.

Railroads—Right of Way Deed—Construction.—A deed conveying lands to a railroad company for its right of way by the owner of a hotel situated near to the proposed road, containing an agreement on the part of the corporation "to maintain the spur track, depot, and platform, and to operate all its regular passenger trains upon said spur track to said depot during what is known as 'winter tourist season,' which consideration is binding upon the party of the second part, its successors and assigns," taken in connection with the conditions that surrounded the parties and the purpose to be accomplished, indicates an intention that the agreement should remain in force at least during a continuance of substantially the same mutual conditions and relations of the parties and their privies.

Injunction—Right of Way Deed—Breach of Conditions.—Where the owner of land conveys it to a railroad corporation for the right of way of its main line, and the corporation violates its agreement contained in the deed of conveyance to maintain a spur track and depot on the spur track, the grantor of the land cannot enjoin the running of trains over the main line, since the public have rights requiring uninterrupted service over the main line.

Specific Performance—Contracts Enforceable.*—While equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment, and technical knowledge, contracts relating to the operation of railroads may be specifically enforced.

Carriers—Control and Regulation—Validity of Contract.—While a common carrier railroad corporation may not be bound by a contract which renders the corporation incapable of performing its duties to the public, yet where the subject-matter of a contract made by such a corporation is not foreign to the lawful purposes of the corporation, but is fairly within its authorized powers and purposes, and the contract is not forbidden by statute, and is not otherwise illegal, it will not be nullified by the courts.

Specific Performance—Contracts Enforceable—Operation of Railroad.—Where a railroad company accepts a deed conveying to it land for its right of way, and so uses the land, any valid contract or agreement contained in the deed of conveyance is binding upon the railroad company, even though the company did not sign the deed; and, under proper circumstances, such agreement may be enforced in equity by specific performance.

*See foot-notes appended to St. Louis, etc., R. Co. *v.* Crandall (Ark.), 15 R. R. R. 837, 38 Am. & Eng. R. Cas., N. S., 837; City of Tyler *v.* St. Louis S. W. Ry. Co. (Tex.), 19 R. R. R. 625, 42 Am. & Eng. R. Cas., N. S., 625.

Taylor *v.* Florida East Coast Ry. Co

Same—Maintenance of Depot and Spur Track.*—Where the owner of a hotel conveys land to a railroad company upon which to construct its right of way for the main line, a spur track, and depot, and the deed of conveyance contains an agreement upon the part of the railroad company to maintain the spur track and depot to a point near the grantor's hotel, and to operate all its regular passenger trains upon the spur track to the depot during a certain season of the year, and it appears that a controlling consideration for the conveyance was the maintenance of the spur track and depot thereon and the operation of passenger trains over the spur to the depot, which would be peculiarly beneficial to the grantor's hotel property and business, and extensive improvements of the hotel property are made upon the fact of the agreement to maintain the spur and depot and to operate the passenger trains as stated, such agreement may be specifically enforced in equity, unless such enforcement will directly, materially, and injuriously affect the rights of the general public. This accords with the public policy declared in chapter 4203, p. 139, Acts 1893; section 2848, Gen. St. 1906.

Same—Jurisdiction—Decree.—Where a court of equity properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by adjudicating all matters properly presented and involved in the case. Injunctions, both mandatory and restraining, may be granted, and damages may be awarded, upon proper allegations and proofs, when necessary to do complete justice.

(Syllabus by the Court.)

Appeal from Circuit Court, Brevard County; Minor S. Jones, Judge.

Bill by Henrietta W. Taylor and others against the Florida East Coast Railway Company. Decree for defendant, and complainants appeal. Reversed and remanded.

Cooper & Cooper, for appellants.
Geo. M. Robbins, for appellee.

WHITFIELD, J. The cause of action alleged is, in brief, that Fred F. Taylor and the appellee in 1892 entered into an agreement by which, in consideration of the conveyance of certain described lands by Taylor to defendant on which to build a portion of defendant's main line, and also a designated spur track, Y, depot, and platforms, at Rockledge, Fla., and the payment by Taylor of $2.500 towards the erection of the track and depot, and the release of claims for damages amounting to $2,500 to the defendant by Taylor, the defendant agreed to construct a Y and a spur track from its main line to a point near where a hotel owned by Taylor was being reconstructed, to erect a depot and platforms there, and

*See foot-note on preceding page.

to maintain said spur track, depot, and platforms at said point, and to operate all its regular passenger trains upon the spur track to the depot during what is known as the "winter tourist season" in that locality; that the defendant constructed the spur track and erected the depot; that Taylor was in possession of said land, and on said understanding and agreement permitted defendant to construct its track upon the land and to take possession thereof under said understanding and agreement; that, relying upon said agreement and the great advantage to accrue therefrom and from the construction of the spur track near his hotel on Indian river, then being reconstructed, said Taylor changed his plans from simply reconstructing the then existing hotel, and built a large, modern, and expensive hotel building for the accommodation of tourists, and expended thereon about $65,000, and also purchased additional property immediately north of the hotel property and improved same at a cost of about $18,000; that said expenditures were made upon the reliance of Taylor on said agreement; that Taylor and wife conveyed the land to defendant, the consideration stated in the deed of conveyance being that the defendant "having constructed a spur track from the main line of its railway into Rockledge and erected a depot at the easterly end of said spur track, and its agreement to maintain said spur track, depot, and platform and to operate all its regular passenger trains upon said spur track to said depot during what is known as the 'winter tourist season,' which consideration is binding upon the party of the second part, its successors and assigns;" that defendant accepted the deed and the money as aforesaid, had the deed duly recorded, and took and still holds possession of the land conveyed under the agreement; that after the winter of 1894 in accordance with said agreement the depot was continuously and regularly maintained at the end of the spur track near the Indian river and within 200 feet south of said hotel, and regular passenger trains of defendant operated over same to said depot, and the depot maintained as stated in the agreement; that until October 16, 1906, defendant recognized its obligation to maintain said depot at the end of the spur track near the hotel and to operate its regular passenger trains during the tourist season to said depot, and up to about October 21, 1906, did so in pursuance of the terms of said agreement and said deed; that, after the construction of said track and depot, Taylor completed the hotel, and the same was profitably operated on account of its location on Indian river, and on account of its accessibility from said track and depot and the attractive appearance of the hotel and grounds to tourists and travelers on arriving over said track at the said depot; that on November 25, 1905, Fred F. Taylor died intestate, leaving Henrietta W. Taylor, his widow, Albert A. Taylor, and Blanche Taylor Peck, his only children, and that Henrietta W.

Taylor had duly elected to take a child's part in the estate; that Fred F. Taylor died seised and possessed of the hotel property, and that said widow and heirs have fee-simple title to said property; that on Sunday, October 21, 1906, defendant with a work train and with a large force of workmen tore up and removed the spur track and portions of the depot, and abandoned same, and located another depot on the main line at least a half mile away in a most undesirable, unsuitable, and swampy locality, extremely unattractive in appearance and unsuited for the purposes of such depot, and the appearance and view from same to travelers arriving thereat are in all respects unattractive and repulsive; that, in addition to abandoning said depot, defendant removed the telegraph office, express office, and baggage rooms to the new depot; that the removal of said depot was done without notice to complainants, without their knowledge or consent, and in a secret and clandestine manner, indicating a purpose to violate the rights of complainants and to prevent them from obtaining relief; that complainants have demanded and defendant has refused a restoration of said spur track and depot and a carrying out of said agreement and deed; that defendant retains the money, the release for damages, and the right of way given by Taylor; that the removal of the spur track and depot and the nonoperation of the train violates the agreement, greatly injures and depreciates all of complainants' said property, and particularly the value of the hotel property and the use of the same as a hotel, and largely increases the cost of operating the hotel because of additional transportation to and from the depot; that practically the entire stock of the defendant company is owned by the same persons who own and control the stock of another corporation that owns and operates hotels lying north and south of complainant's hotel in other cities on said line of railroad, which hotels compete with complainants' hotel, and defendant has constructed spur tracks near to the defendant's hotels, and maintains depots at the end of such spurs near its hotels for the benefit of said hotel company, thus making an unfair and unjust discrimination against complainants' hotel; that because of such acts great loss and damage have accrued to complainants; that the business of the hotel is daily being lessened and damaged because of said acts of defendant. The prayer is for a decree for specific performance of the agreement, and for a restoration of the spur track and depot and the operation of the trains as agreed, and for temporary injunction and an accounting. A temporary injunction was denied, and the court sustained the demurrer on the grounds of no equity and of an adequate remedy at law, and dismissed the bill. An appeal was taken by the complainants from the final decree, and the orders and decree are assigned as errors.

Upon the application for a temporary injunction on bill and evidence, the complainants filed several affidavits and other evidence

in support of the allegations of the bill. The defendant presented a time-card schedule of its passenger trains, and also an affidavit of its general manager stating that defendant did not agree with Fred F. Taylor to permanently and perpetually maintain the spur track constructed by it into the Rockledge hotels, regardless of the exigencies of its future business or the interests of the public interested in the operation of such railroad, but simply to "maintain said spur track, depot, and platform, and to operate its regular passenger trains upon said depot during what is known as the 'winter tourist season,'" without any stipulation as to the duration of said maintenance; that said railroad company has fully complied with said contract by maintaining said spur track and operating its passenger trains on the same for the period of 13 years, until the lengthening of its line, the increase of its business, and the interests of its patrons conflict with the further maintenance thereof; that some 20 to 30 minutes have been required in the past to operate its passenger trains over said spur, and this time has been added to the schedule time of through passenger trains; that said railroad is now operating under different conditions from those which existed when said arrangement was made; that the country below Rockledge has become settled up, and many more people have to be catered to below Rockledge, which requires the stopping at stations not in existence at the time said spur was built; that the main line is being extended to Key West, and a reasonably good passenger service now requires that the minimum time should be lost by stops at stations, and that no detours from the main line shall be made; that affiant expects that in a comparatively short time the public interest will require the elimination of the operation of the spurs at Ormond and Palm Beach, except, perhaps, by special trains, so that reglar passenger trains shall not be unreasonably delayed.

In a proceeding for the specific performance of a contract, a temporary injunction will not be granted, unless the allegations of the bill of complaint warrant a decree of specific performance, nor unless it also appears that an injunction is appropriate and just. Knox *v.* Spratt, 19 Fla. 817. The granting or denying of a temporary injunction is largely within the discretion of the trial judge; but if the allegations of the bill are sufficient, and the evidence in support thereof is ample to warrant the granting of the temporary injunction, and no sufficient defense is made, an order denying an injunction will be reversed. Godwin *v.* Phifer, 51 Fla. 441, 41 South. 597; City of Apalachicola *v.* Curtis, 9 Fla. 340, 74 Am. Dec. 284.

The allegations of the bill of complaint are, as shown herein, *prima facie* sufficient to warrant a decree of specific performance.

The matters set up in the affidavit offered by the defendant, if available to it, are not sufficient as a defense under the facts as they now appear. If the public interests in the service being

rendered by the defendant railroad company as a common carrier would be injuriously affected by a performance of the agreement made between the railroad company and Fred F. Taylor, or by an observance of the conditions of the deed conveying the land to the defendant, relief from the contract should be sought by the proper plaintiff in the courts.

It is the duty of a common carrier railroad corporation to have regard for the rights of the public in the service it engages to perform under the franchises the state permits it to use primarily for the benefit of the public. This requirement embraces the duty to render a service adequate to meet all just requirements of the public, including reasonable dispatch, convenience, regularity, and promptness in the transportation of passengers, provision and maintenance of adequate depot facilities suited to the business and convenience of the communities along the road, and the performance of the duties and the rendering of the service due to the public, without unjust discriminations of any character as to persons, localities, or conditions. This duty, however, does not relieve the corporation from its contract obligations to individuals, when an observance of the obligations does not materially and injuriously affect the rights of the public; and where the public, or any member of it, is so affected, the rights of the respective parties cannot be arbitrarily determined by the corporation for itself. If the private rights under the contract cannot be adjusted by agreement, resort should be had to the courts by proper parties, where all rights will be adjudged. It is the duty of the corporation to observe the obligation of its contracts with individuals that are made in good faith, and that do not necessarily, directly, and materially affect injuriously substantial rights of the public, until the corporation is relieved from such contracts by due course of law. The railroad company is allowed a reasonable discretion in the performance of its duties and in the rendering of service to the public; but such discretion should be exercised in good faith and for the public welfare, and not arbitrarily, and it is subject to control and regulation by governmental authority. State ex rel. Attorney General *v.* Atlantic Coast Line R. Co., 53 Fla. —. 44 South. 213.

If the defense interposed here can avail the defendant in this proceeding, the proofs in this case do not clearly show that the substantial interests of the public are necessarily, directly, and materially affected injuriously. The running of all passenger trains into the depot near the hotel was continued for years, and there is ample and undisputed testimony that the public in and around the town of Rockledge was better served by the depot near the hotel than at the new point. It does not appear that through travel on the main line of the railroad was unreasonably hindered and delayed by operating the passenger trains into the depot over the spur, or

that any public authority or any part of the public has complained of inconvenience occasioned thereby, or demanded an abondonment of the depot on the spur for the welfare or convenience of the public. It does not appear that the use of the spur and depot operated as an unjust discrimination against other localities or persons; but it is alleged that the abandonment of the spur and depot at this point operates as an unfair and unjust discrimination against the complainants' hotel, for the reason that other hotels on said railroad, owned and controlled by the owners of the defendant railroad, have the advantage of depots on spur tracks to such hotels, and there is uncontradicted evidence that the local public at the town of Rockledge was well accommodated by the depot on the spur there, and that the same public is less conveniently accommodated by the depot at the new point. On the showing made it appears that the public was better served by the depot on the spur near the hotel.

The defendant appears to have asked for and received in kind the property and advantages from the complainants under the contract, and promised in consideration thereof to perform its stated undertakings. Relying upon the promise of defendant, Taylor incurred great expenditures and is damaged by the defendant's breach in a way that cannot be adequately compensated in damages. Under the facts alleged it is *prima facie* equitable that the complainants should have the benefit of a performance by the defendant of the agreement on its part in the manner and to the extent agreed on, at least in the absence of a proper showing of superior rights of the public against the corporation as a common carrier.

The contention that the contract of the defendant with the complainants had been fully performed cannot be maintained. The agreement and consideration for the deed was "to maintain said spur track, depot, and platform, and to operate all its regular passenger trains upon said spur tracks to said depot during what is known as the 'winter tourist season,' which consideration is binding upon the party of the second part, its successors and assigns." This language, the conditions that surrounded the parties, and the purpose to be accomplished by the agreement indicate an intention that the agreement should remain in force at least during a continuance of substantially the same mutual conditions and relations of the parties and their privies. The officers of the defendant repeatedly recognized in writing the obligation of the agreement as a continuing one for the benefit of the complainant's hotel business, which in great measure depended upon the agreed service by the defendant for successful operation. If the enforcement of the agreement injuriously affects the material rights of the general public, the relief sought herein should be denied.

The prayer for an injunction to restrain the defendant from running its trains over the portion of its main line built on the

land conveyed to the defendant by the complainant should be denied, in view of the rights of the public to transportation service over the main line of the railroad. See Pensacola & A. R. R. Co. *v.* Jackson, 21 Fla. 146.

The grounds of the demurrer to the bill of complaint are: (1) No equity; (2) adequate remedy at law; (3) full performance of the contract by the defendant.

The granting or denial of equitable relief for the specific performance of a contract rests within the sound judicial discretion of the court, and such discretion is controlled by the established principles of equity applicable to the facts of each case. See Asia *v.* Hiser, 38 Fla. 71, 20 South. 796; 20 Ency. Pl. & Pr. 389 et seq.; 3 Page on Contracts, § 1624 et seq.

Courts of equity will not enforce the specific performance of a contract where the remedy at law by action for damages or otherwise affords a complete and adequate remedy; but where the injury is peculiar in its nature, and a jury cannot estimate with any degree of certainty the damages sustained, and no other adequate remedy is afforded at law, specific performance will be enforced by a court of equity, where the necessary facts are alleged and proven.

While equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment, and technical knowledge, contracts relating to the operation of railroads have been specifically enforced in a number of cases. Where a railroad company, in consideration of the conveyance to it of land, makes a reasonable agreement to perform in return for such conveyance certain service that is fairly within its corporate powers and purposes, and that is not essentially inconsistent with the company's duty to the general public, such agreement, if not otherwise illegal or unenforceable, will be specifically enforced in equity upon proper allegations and proofs. See 6 Pomeroy's Eq. Jur. § 761; Union Pac. R. Co. *v.* Chicago, R. I. & P. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; Id., 51 Fed. 309, 2 C. C. A. 174; Id. (C. C.) 47 Fed. 15; Schmidtz *v.* Louisville & N. R. Co., 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809; Joy *v.* St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; Hood *v.* Northeastern Ry. Co., 8 L. R. Eq. Cas. 666; Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617; Lawrence *v.* Saratoga Lake R. Co., 36 Hun, 467; 2 Current Law, 1682.

The bill of complaint alleges in direct terms an agreement between Fred F. Taylor and defendant, under which Taylor was to convey to defendant particular lands at Rockledge needed for right of way for a portion of the main line and for a designated spur track and depot purposes for a railroad company, to pay defendant $2,500 towards building specified side

track and depot on the land, and to release a claim of $2,500 for damages against defendant; and defendant was to construct its spur track and depot to a point near to complainants' hotel, and on the land conveyed as agreed upon, and to maintain the spur and depot, and to operate all of its regular passenger trains upon said spur track to the depot near plaintiffs' hotel during the winter tourist season. The consideration on the part of the defendant as to maintaining the spur and depot and operating the trains was stated in the deed conveying the land to defendant corporation to be "binding upon the party of the second part, its successors and assigns." It is also alleged that the designated land was duly conveyed, possession given to and taken by defendant, and title thereto duly recorded; that the track and depot was constructed as agreed, and trains operated thereon as agreed until October, 1906, when the spur track and depot were on Sunday secretly taken away and the depot removed, without complainants' knowledge or consent, to an inaccessible and unsuitable point a half mile away, to the great and peculiar damage of complainants, whose hotel property had been enlarged and greatly improved at large expense in reliance upon the agreement that the spur track and depot would be maintained and the trains operated thereon to the convenient and attractive depot near complainants' hotel as agreed.

When the grantee accepts a deed and enters into possession of the land conveyed, he is deemed by such acts to have expressly agreed to do what is stipulated in the deed he should do, even though he did not sign the deed. Silver Springs, O. & G. R. Co. v. Van Ness, 45 Fla. 559, 34 South. 884.

Where a railroad company accepts a deed conveying to it land for its track, and so uses the land, any valid contract or agreement contained in the deed of conveyance is binding upon the railroad company, and, under proper circumstances, such agreement may be enforced in equity by specific performance. See Post v. West Shore R. Co., 123 N. Y. 580, 26 N. E. 7.

While a common carrier railroad corporation may not be bound by a contract which renders the corporation incapable of performing its duties to the public, yet where the subject-matter of a contract made by such a corporation is not foreign to the lawful purposes of the corporation, but is fairly within its authorized powers and purposes, and the contract is not forbidden by statute and is not otherwise illegal, it will not be nullified by the courts. See Union Pac. R. Co. v. Chicago, M. & St. P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; Jacksonville M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610.

The agreement contained in the deed of conveyance of the right of way cannot be said to be in violation of the public policy of

this state, since chapter 4203, p. 139, Acts of 1893 (section 2848, Gen. St. 1906), authorizes the specific performance of contracts in the nature of this one, and, if necessary, the appointment of a receiver to perform the contract. See 1 Page on Contracts, § 326.

The contract is to be construed with reference to its subject-matter and the circumstances under which and the purposes for which it was made. Its language, so considered, requires a continuance of the defendant's agreement to maintain the spur and depot and to operate the trains thereon as stated, at least as long as conditions and relations of the parties thereto continue substantially as begun, unless superior rights of the public or others properly intervened.

In this case the agreement is that defendant and its successors and assigns shall maintain a spur track and a depot thereon and operate trains thereon as agreed, and not to permanently establish a terminus of a common carrier railroad corporation and to merely establish the main shops of the railroad at a particular town, as in the case of Texas & P. Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, or for damages for removing a depot built and used for 36 years under a void parol contract to establish a depot at a stated point, as in Texas & P. Ry. Co. v. Scott, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; and the facts here are also quite different from those in Sherwood v. Atlantic & D. Ry. Co., 94 Va. 291, 26 S. E. 943, and Jones v. Newport News & M. V. Co., 65 Fed. 736, 13 C. C. A. 95, relied upon by the defendant. The last-mentioned case accords to the directors of a railroad company the right to terminate a contract that in their judgment was against public interest. This doctrine cannot be maintained under our system of laws.

The conveyance containing the contract was accepted and used by the defendant. The contract is certain and definite in its terms. Possession was taken of the land by the defendant and retained. The contract was completely executed by Taylor and has been partly performed by the defendant. It is apparent from the contract itself that one of the controlling considerations for the conveyance by Taylor to the defendant corporation was "its agreement to maintain said spur track, depot, and platform, and to operate all its regular passenger trains upon said spur track to said depot during what is known as the 'winter tourist season,' which consideration is binding upon the party of the second part, its successors and assigns." Having accepted the conveyance, the defendant is bound by the agreement stated therein as a consideration for the conveyance of the right of way; and, having received in specie or in kind all the benefits of the conveyance to it, the defendant in equity should bear the burdens imposed by the conveyance thus accepted and used for its corporate purposes in rendering a useful service to the public, unless a further continuance

of it will injuriously affect the service of such railroad to the general public. The damages to the complainant alleged as the result of the failure and refusal of defendant to carry out its part of the agreement are peculiar to the conditions affecting the business with reference to which the agreement was made. They are in their nature such as cannot be ascertained with any degree of certainty, and cannot be adequately compensated for in damages. Therefore an action at law for damages will not afford the complainants an adequate or a reasonably complete remedy. See Lane *v.* Pacific & I. N. R. Co., 8 Idaho, 230, 67 Pac. 656. See, also, Southern Ry. Co. *v.* Franklin & P. Ry. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

The defendant having received in specie or in kind and used the property of complainant, in consideration that certain things shall be done by the defendant, its successors and assigns, with reference to the particular property and peculiar business of the complainant, the successful use of which property and business was a controlling consideration for the conveyance, the complainant is in justice entitled to a performance of the defendant's agreement according to its terms as far as it is legally within the power of the defendant to do, unless compliance therewith further materially interferes with the defendant company's duty to the general public.

The bill of complaint alleges that the abandonment of the depot near complainants' hotel, and the removal of the spur track and depot to an inaccessible and undesirable place a half mile away, is seriously injurious to the welfare of at least a portion of the public. This is, of course, admitted by the demurrer, and it cannot be assumed that the service rendered by the defendant railroad company over the spur track and at the depot near the hotel of complainant for more than 10 years, as alleged, injuriously affected the rights of the public. It is alleged that spur track and depot service similar to that formerly rendered under the agreement, but now denied to complainants, is being rendered to hotels at other points on the line of defendant's railroad; and this tends to indicate that the general public is not seriously injured by such spur track and depot service.

It does not appear that a specific performance of the agreement will work a hardship on the defendant or be of little utility to the complainants; but, on the contrary, a serious injury to complainants appears, and it is not shown that the performance of the agreement will be unduly burdensome to the defendant or result in material detriment to the public interests.

The peculiar damages alleged as accruing to the complainants by the refusal of the defendant to perform its part of the agreement are to property and business which were the only inducement for the agreement and are not capable of being adequately compensated by an action for damages. See Joy *v.* St. Louis, 138 U.

S. 1, 11 Sup. Ct. 243, 34 L. Ed. 834; Franklin Tel. Co. *v.* Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776. The allegations as to the agreement and the subjects to which it relates appear to be sufficiently definite to warrant a decree of specific performance, if sustained by the proofs.

The terms of the agreement, the circumstances under which it was made, and the purpose to be accomplished by it, and the allegations of the bill of complaint, clearly show that the agreement has not been fully performed on the part of the defendant.

Where a court of equity properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by granting appropriate process and by adjudicating all matters properly presented and involved in the case. Injunctions may be granted upon proper showing, and damages awarded, when necessary to complete justice in the case. See Lyle *v.* Addicks, 62 N. J. Eq. 123, 49 Atl. 1121; Worrall *v.* Munn, 38 N. Y. 137; Schmidtz *v.* Louisville & N. R. Co., 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809; 2 High on Injunctions (7th Ed.) § 1120 et seq.

The injury complained of was begun October 21, 1906, and the bill for relief was filed January 10, 1907, which appears to be reasonable promptness. Under the facts as they appear, an appropriate mandatory injunction should be granted, unless the defendant by its answer and proofs to sustain it can show that the interests of the general public will be injuriously affected thereby, or that the duration of the contract was not to be indefinite as to time as alleged. See 4 Pomeroy's Eq. Jur. § 1359; Wolverhampton & Walsall Ry. Co. *v.* London & Northwestern R. Co., 16 L. R. Eq. Cas. 433; 5 Words & Phrases Judicially Defined, 4332; Southern Ry. Co. *v.* Franklin & P. Ry. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

In so far as the relief prayed for can be decreed without serious detriment to the public interests, the prayer should be granted. From the allegations of the bill of complaint it does not appear that the rights of the general public will be injuriously affected by granting the relief prayed for, so far as it extends to the spur track and depot and the operation of the trains as required by the agreement.

The decree dismissing the bill of complaint is reversed, and the cause is remanded, with directions to overrule the defendant's demurrer and to require the defendant to answer the bill, and for such further proceedings as shall be consonant with equity practice and not inconsistent with this opinion.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

GREGORY *v.* ELMIRA WATER, LIGHT & R. CO.

(Court of Appeals of New York, Dec. 20, 1907.)

[83 N. E. Rep. 32.]

Appeal—Questions Reviewable.—A defendant, appealing from a judgment of the Appellate Division unanimously affirming a judgment entered on a verdict against him, is precluded from arguing his exception to the denial of a motion for nonsuit, and is confined to his exceptions taken during the trial.

Carriers—Passengers—Assumption of Risks.*—A street car passenger, who voluntarily takes his stand on the platform or running board of a car, assumes the dangers necessarily incident to such position; but he is not guilty of negligence.

Same—Negligence.†—A street railway company maintained tracks 4 feet apart for the operation of cars, between which there was a space of 22 inches in the clear. There were no defects in the roadbed or rolling stock. On a holiday, while its cars were overtaxed, a passenger on a crowded car took a position on the running board next to the parallel track, and was struck by a car thereon. He knew of the danger. Held, that the company was required only to use

*For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on car platform, see foot-notes appended to Coffey *v.* Omaha, etc., Ry. Co. (Neb.), 25 R. R. R. 599, 48 Am. & Eng. R. Cas., N. S., 599; foot-notes appended to Louisville & N. R. Co. *v.* Mulder (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66.

For the authorities in this series on the question whether it is contributory negligence in a street car passenger to ride on the running board, see foot-notes appended to Egan *v.* Old Colony St. Ry. Co. (Mass.), 23 R. R. R. 406, 46 Am. & Eng. R. Cas., N. S., 406.

†For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see foot-notes appended to Kline *v.* Santa Barbara Consol. Ry. Co. (Cal.), 25 R. R. R. 41, 48 Am. & Eng. R. Cas., N. S., 41; extensive note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7; Chicago, etc., Ry. Co. *v.* Stibbs (Okl.), 24 R. R. R. 427, 47 Am. & Eng. R. Cas., N. S., 427; foot-notes appended to Marable *v.* Southern Ry. Co. (N. Car.), 24 R. R. R. 418, 47 Am. & Eng. R. Cas., N. S., 418; foot-notes appended to Indianapolis, etc., Co. *v.* Lawson (C. C. A.), 24 R. R. R. 219, 47 Am. & Eng. R. Cas., N. S., 219; Illinois Cent. R. Co. *v.* Johnson (Ill.), 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; Mobile, L. & R. Co. *v.* Walsh (Ala.), 24 R. R. R. 114, 47 Am. & Eng. R. Cas., N. S., 114; foot-notes appended to MacFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to Chicago City Ry. Co. *v.* Shreve (Ill.), 23 R. R. R. 444, 46 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to Farrell *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to Louisville & N. R. Co. *v.* Mulder (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66.

reasonable care to carry him safely under the circumstances, and an instruction that it must have used the "utmost" care was error.

Vann and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Chester H. Gregory against the Elmira Water, Light & Railroad Company. From a judgment of the Appellate Division unanimously affirming a judgment for plaintiff (10 App. Div. 630, 95 N. Y. Supp. 1130), and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Frederick Collin, for appellant.
Charles H. Kipp, for respondent.

EDWARD T. BARTLETT, J. This action was brought to recover damages for personal injuries. The Appellate Division granted the defendant leave to appeal to this court. The defendant operates an electric street car line in the city of Elmira. The accident, the subject of this action, occurred on the 2d of September, 1901, Labor Day, at about 3 o'clock in the afternoon, weather pleasant, and when the street car lines were overtaxed in carrying passengers. Lake street, in the city of Elmira, runs north and south, and upon it the defendant company had laid a double track; the northern terminus being in the village of Horseheads, 5½ miles from the city. The track on the west side of the street was used for cars running south, and on the east side for cars running north. The space between the east rail of the west track and the west rail of the east track was 4 feet. The space in the clear between the two cars involved in this action was 22 inches. The plaintiff, with two companions, boarded a car running north. It was known as a "trailer," and was drawn by an electric motor. All of the seats were occupied, as well as the standing room between the seats and in the aisle. It was an open car, with running boards on each side. The plaintiff and his companions were able to get upon the running board on the west side, and, having done so, it filled the place to its utmost capacity. It seems to have been the practice of the defendant company to allow passengers to ride on the running boards if there was no room in the car. The plaintiff stated upon cross-examination: "I recognized that it would be a good deal safer inside, and still safer if I could have found a place to have stood upon the platform. It was a place of danger every minute that one was upon the running board, if one wasn't in very close. I have ridden on these motor cars more or less for years." The Appellate Division rendered a unanimous decision in affirming the judgment entered upon the verdict, and the appellant is thereby precluded from arguing his exception to the denial of the motion for a nonsuit, and is confined to his exceptions taken during the trial.

Gregory *v.* Elmira Water, Light & R. Co

The principal and controlling question in this case is whether the learned trial judge laid down the proper rule of care under which the defendant rested, in view of the peculiar circumstances. The defendant's counsel states in his brief as follows: "The court erred in its repeated charge to the jury that the defendant was under the duty to use every precaution that human skill and foresight could provide or suggest to protect plaintiff against coming in contact with the south-bound car." It appears that the plaintiff was knocked off from the running board, where he was standing, by the south-bound car striking him on the left shoulder, and that no other passenger upon that running board was interfered with in any way. The south-bound car was a closed car having no running board. The trial judge, alluding to the above facts, charged as follows: "It is practically undisputed that the plaintiff was a passenger on one of the defendant's cars, and it is the duty of the carrier of passengers to use care to provide a reasonably safe place for its passengers; that is to say, a reasonably safe way, and a reasonably safe operation thereof, and the degree of care must be commensurate with the danger involved in the manner in which the business is transacted. In the case where cars are propelled by electricity, it is the duty of the carrier to use every precaution that human skill and foresight can provide to secure the safety of its passengers. It is not an insurer against accidents. It is not bound to foresee every possible emergency or guard against every possible danger. It is not obliged to use the precaution which it may appear, after the happening of the accident, would have prevented it; but, as in this case no similar accident having happened before, it was obliged to use such precaution as human foresight and skill could suggest without knowledge that such an accident was to occur."

The counsel for respondent insists that this was a fair and correct statement of the law, in view of the closing qualification. It is true that the trial judge alluded to the fact that no similar accident had happened; but he does not vary his previous charge that the carrier was to use every precaution that human skill and foresight could provide. There was no qualification of the measure of care which the jury could understand and apply to the case. In other words, the court stated that the defendant rested under the duty of exercising the "utmost" care. The expression "such precaution as human skill and foresight could suggest" is synonymous with "utmost." We are of opinion that this portion of the charge above quoted, under the peculiar circumstances of this case, was erroneous, and that the defendant rested only under the obligation to exercise ordinary care. It has been held that, where a passenger voluntarily takes his stand on the platform or running board of a car, he is not thereby guilty of negligence; but he necessarily assumes the dangers and risks naturally incident to the position he occupies. Cattano *v.* Metropolitan Street

Railway Co., 173 N. Y. 565, at page 573, 66 N. E. 563, at page 566. Cullen, J., there states: "When a passenger takes his stand on the platform of a car, I think he assumes, not the exceptional, but the natural and usual, risks of his position, such as jolts and jars, from which a car propelled, even over the best of tracks, is not entirely free. * * * If a passenger will insist in getting on the crowded platform of a car, so far as the position is dangerous from the presence of the crowd and the natural incidents of the operation of the car to which I have alluded, he takes the risk of those dangers, though not of exceptional ones." In the case at bar there was no defect in the roadbed, the rolling stock, or in the location of the tracks, 4 feet apart, and the operation of the cars, between which there was a space of 22 inches in the clear. As to the passenger in such a position, where there is no defect in the management or operation of the road save such dangers which were common from the peculiar position occupied by the passenger, we are of opinion that the measure of duty on behalf of the carrier is simply to use reasonable care to carry passengers safely under the circumstances. If we were to apply the rule charged by the court below, that the company was bound to use such precaution as human foresight and skill could suggest—that is, "utmost" care—it would be practically to obliterate the rule that when a passenger voluntarily enters upon this dangerous position he assumes the ordinary risks in this respect. We do not mean to relax the rule in any other respect except in such cases. The plaintiff frankly recognized, as already pointed out, that he voluntarily entered a place of great and continuing danger.

As the foregoing error in the charge leads to a reversal of the judgment, we deem it unnecessary to discuss the other exceptions contained in appellant's brief.

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

SELLERS *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, July 12, 1907.)

[57 S. E. Rep. 1102.]

Evidence—Parol Evidence.*—Parol evidence is admissible, where a written contract is found by the judge calculated to mislead men of ordinary intelligence, to enable the jury to determine if either party was misled.

Carriers—Round-Trip Ticket—Modification.—A conditional round-trip ticket had the words "Charleston, S. C., and Return" written in ink across the printed matter. Held not to make a new contract, or render the one in print, requiring the ticket to be validated in Charleston, ambiguous.

Appeal from Common Pleas Circuit Court of Chesterfield County; Gage, Judge.

Action by Hardy J. Sellers against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wilcox & Wilcox, Henry E. Davis, and *Edward McIver,* for appellant.

W. P. Pollock and *George K. Laney,* for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by plaintiff as the result of certain wrongful acts on the part of the defendant. The complaint alleges that on or about the 16th of May, 1904, the plaintiff purchased from the agent of the Chesterfield & Lancaster Railroad Company, at Chesterfield, S. C., a round-trip ticket from that point to Charleston and return; that he was permitted to use the ticket on the trip from Chesterfield to Charleston, but on the return trip the conductor of the Atlantic Coast Line Railroad Company refused to accept the ticket, and put him off the train at a point about seven miles from Charleston, where there was no shelter or other conveniences; in consequence of which he was compelled to walk back to Charleston; that the conduct of the conductor in so doing was willful, wanton, and unlawful; that he was about 70 years of age, infirm, not accustomed to travel, ignorant of its methods and customs, and on account of his lack of experience of such matters and his extreme age was not possessed of ordinary intelligence as to such

*For the authorities in this series on the subject of the admissibility of parol evidence to vary the contract purported to be expressed by the terms of a railroad passenger ticket, see foot-notes appended to Nickles *v.* Seaboard Air Line Ry. (S. Car.), 20 R. R. R. 755, 43 Am. & Eng. R. Cas., N. S., 755.

matters; that when he purchased the ticket he did not read it, and knew none of its conditions until he presented it to the conductor, who informed him that it was not good, because he had not signed it and had it stamped as required by its terms; "that plaintiff noticed that there was some printed matter on the said ticket, but the same was written across in pen and ink with the words, 'Charleston, S. C., and Return,' and plaintiff thought that the said ticket so indorsed or written across was simply a ticket to Charleston, S. C., and return to Chesterfield, and that the printed matter thereon so written across was by such writing canceled, and had nothing to do with the ticket as so indorsed, and he alleges that by such indorsement or writing across said ticket all the conditions thereon were canceled, that the said indorsement was made thereon before the plaintiff had signed said ticket, and by the writing thereof by the agent selling same to plaintiff he was misled if any conditions remained to the ticket, the said selling agent not telling plaintiff anything to the contrary;" that by the willful, wanton, and unlawful conduct of the defendant he has been damaged in the sum of $8,000.

The defendant answered, admitting the first and second allegations of the complaint, but alleged that the ticket was sold at a greatly reduced rate, in consideration of which plaintiff agreed to all the conditions and requirements printed thereon, with which he failed and refused to comply. All the other allegations of the complaint were denied, and defendant, by way of further defense, alleged, if plaintiff was ejected from its train, it was because of his failure to present his ticket duly validated, as required by his special contract. Upon the call of the case defendant interposed a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, for the reasons it appeared upon the face thereof that there was a failure on the part of the plaintiff to comply with the requirements of the contract, to furnish evidence of his identity, and to sign the ticket in the presence of the agent at Charleston. The case came on for trial before his honor, Judge Benet, and a jury at the November, 1905, term of court for Chesterfield County. The demurrer having been overruled, a trial was had, which resulted in a verdict for plaintiff in the sum of $2,000. On a motion for a new trial it was ordered that the verdict be set aside and a new trial granted, unless plaintiff would remit all except $750. Plaintiff having refused to remit, the cause came on for the second trial, before his honor, Judge Gage, and a jury, at the spring, 1906, term of court for Chesterfield county. The demurrer was again interposed and overruled. The jury rendered a verdict in plaintiff's favor for $2,500, and the defendant has appealed upon exceptions covering 22 pages.

The vital question in the case involves the construction of the contract, and this question will be solved by ascertaining the

force and effect of the words, "Charleston, S. C., and Return," written in ink upon the face of the ticket. The ruling of the presiding judge upon this question was as follows: "When you purchased the ticket, did you or not read the ticket—read all this printed matter on it? A. No, sir; I did not. Q. Did you read any of that printed matter? A. No, sir; I read nothing. I thought it was all right. I didn't read it. Q. Did you notice, when you bought it, this writing across it? A. Yes, sir. Q. What effect did you think that had on the ticket, or on the printed matter under it? (Objected to.) The Court: As held by our Supreme Court, if a purchaser signed a ticket of unequivocal meaning, the law presumes him to have known what was in it, whether he actually knew or not. The courts say, however, if the ticket was received under a mistake, which I understand to be a mistake of fact, that the party is not bound. Now, the ticket in evidence here, in my judgment, is in effect two tickets. One of them is set out in the printed matter and signed by the party, and the other is a statement in ink, across the face of it, that it is for 'Charleston, S. C., and Return.' Now, if, as a matter of fact, that indorsement across the face of the ticket led the witness to believe that this was a straight ticket, without conditions, from Chesterfield to Charleston and return, he ought to be allowed to say so, because, at best, it is a doubtful contract. The writing across the face of it makes it doubtful; and it seems to me in the last analysis, it being doubtful, it is a question that would have to be left to the jury whether or not he bought an 'iron-clad' ticket, or bought a straight ticket to Charleston and return. Now, that is the way it seems to be on short notice. There is no charge of fraud and no charge of misrepresentation, but a mistake—that the man bought it under a mistake."

The construction of a written instrument presents a question of law, to be determined by the judge, and is not to be submitted to the jury, unless its language is ambiguous, requiring explanatory testimony. Ky. Mag. Mfg. Co. *v.* People's Supply Co., 77 S. C. 92, 57 S. E. 676. When, however, the judge, in construing the instrument, concludes that upon its face it is reasonably calculated to mislead a man of ordinary intelligence, then it becomes his duty to allow the introduction of parol testimony, for the purpose of enabling the jury to determine whether the individual in the particular instance was misled. The cases of Bethea *v.* Railroad, 26 S. C. 91, 1 S. E. 372, and Daniels *v.* Railroad, 62 S. C. 1, 39 S. E. 762, shows that ordinarily a person purchasing a round-trip ticket is not entitled to return passage thereon, unless he complies with the requirements of the contract as to signing in the presence of the agent, at the point from which his return trip commences. The words, "Charleston, S. C., and Return," do not change the terms of the contract in any respect, as similar words were already a part thereof. The mere in-

sertion of words already forming part of a contract can neither have the effect of making a new contract nor of rendering it ambiguous, in which case it would be necessary to resort to parol testimony explanatory of the ambiguity, and this would present a question to be determined by the jury. It appears upon the face of the contract that the words, "Charleston, S. C., and Return," could not reasonably be construed as having any other object (if they were intended to have any effect whatever) than that of convenience in advising the conductor at a glance as to the nature of the ticket. Therefore it cannot be successfully contended that they were reasonably calculated to mislead a person of ordinary intelligence. The exceptions raising this question are sustained.

Under this construction of the contract the plaintiff was not entitled to any damages arising out of the failure to transport him as a passenger on his return trip. Nor do we find any testimony from which it could reasonably be inferred that he was ejected from the train by the conductor in such a highhanded manner as manifested a disregard of the plaintiff's rights. The case falls within the principle announced in Gwynn *v.* Telegraph Co., 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819. These views render unnecessary the consideration of the exceptions seriatim.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

H. L. HALLIDAY MILLING CO. *v.* LOUISIANA & N. W. R. CO.

(Supreme Court of Arkansas, Nov. 19, 1906.)

[98 S. W. Rep. 374.]

Carriers—Overcharge—Action for Excess—Admissibility of Evidence.—In an action against a carrier to recover an excess of charges paid, testimony of the rate clerk of the railroad commission as to what would be a reasonable charge, based on the report of a former auditor of the railroad, was admissible, notwithstanding errors in the report; it being open to the carrier to show the errors.

Evidence—Expert Testimony—Competency.—On an issue as to reasonable rate for the shipment of goods, testimony of a person having special knowledge of rates under similar condition was properly admissible, though he did not have knowledge of the financial condition of the road and cost of transportation on a particular line.

Carriers—Overcharge—Action to Recover—Evidence.—On an issue as to reasonable rates for the carriage of goods over a particular division, evidence of through rates and the division thereof was admissible.

Same—Regulation—Interstate Shipment.*—A complaint in the language of Kirby's Dig., §§ 6621, 6730, for the recovery of an excess over reasonable charges paid to a carrier for an interstate shipment, which is also good as stating a common-law cause of action, is not rendered bad by Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], dealing with the subject of reasonable and just rates, in view of section 22 of that act (24 Stat. 387 [U. S. Comp. St. 1901, p. 3171]), providing that nothing therein contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the act are in addition to such remedies.

Courts—Conflicting Jurisdiction—State and Federal Courts—Regulation of Interstate Commerce.—The common-law right of a shipper to recover an excess of charges paid to a carrier for an interstate shipment is not within the exclusive jurisdiction of the federal courts, but may be enforced in a state court.

Appeal from Circuit Court, Columbia County; Charles W. Smith, Judge.

Action by the H. L. Halliday Milling Company against the

*For the authorities in this series on the subject of state interference with interstate commerce, see foot-notes appended to State *v.* Omaha Elevator Co. (Neb.), 23 R. R. R. 510, 46 Am. & Eng. R Cas., N. S., 510; foot-note appended to Harrill Bros. *v.* Southern Ry. (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

Louisiana & Northwest Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

C. W. McKay, for appellant.
Stevens & Stevens and *Moore, Smith & Moore,* for appellee.

HILL, C. J. Appellant was a grain dealer at Cairo, Ill., and shipped seven cars of corn and one car of flour to customers at Magnolia, Ark., in December, 1905, at a delivered price. The shipments were made over St. Louis Southwestern Railroad from Cairo, Ill., to Pine Bluff, Ark., there consigned to a local agent of appellant, and by him reshipped over the St. Louis Southwestern from Pine Bluff to McNeil, and from McNeil to Magnolia over line of appellee. The latter distance is 6.4 miles, and the distance from Pine Bluff to McNeil about 100 miles. Cairo to Magnolia is about 378 miles. The appellee railroad collected from appellants consignees 12½ cents per hundred pounds for its freight for shipment over the 6.4 miles from McNeil to Magnolia; and appellant repaid to its consignees the charge over its contract price of delivery, and sued appellee company for an amount claimed to be excessive and unreasonable and unjust, and alleged that 6 cents per hundred pounds on corn and 7½ cents per hundred pounds on flour would have been a reasonable rate, and prayed for recovery of the sum paid over said rate. The court directed a verdict for the defendant, and the sole question is whether appellant adduced evidence authorizing it to go to the jury on the charge made.

In passing upon this question, only the evidence favorable to appellant is pertinent, and only it will be reviewed. Just previous to the shipments in question there had been a joint rate between St. Louis Southwestern Railroad and appellee from Cairo to Magnolia, on corn 20 cents and on flour 25 per hundredweight, of which appellee received 30 per cent. or 6 cents on corn and 7½ cents on flour. Whether this rate was in force at time of shipment was a matter of conflict in the evidence. There was also a joint rate existing between appellee near this same time with other connecting roads for corn and flour from Cairo to Magnolia coming over Vicksburg, Shreveport & Pacific Railroad to Gibbsland, La., there connecting with appellee and over appellee road from Gibbsland to Magnolia, a distance of 54 miles, for much less than the charge complained of. There was also in evidence the Arkansas commission tariff which was five cents on corn and eight cents on flour from McNeil to Magnolia. There was evidence from a witness thoroughly familiar with rates on the commodities under inquiry and in this section of the country who testified to the unreasonableness of the charges made, and sustained as reasonable and fair the charges as alleged in the complaint. The basis of his estimates was knowledge of rates under similar circumstanes and knowledge of the usual divisions of ac-

cepted rates. Other testimony along the same line was offered. Appellee also introduced the rate clerk of the Arkansas railroad commission whose duties were to assist the commission in fixing rates within the state, and who had full knowledge of existing rates and conditions. He had before him the financial statement of appellee road rendered to the commission (the correctness of which was attacked by appellee), showing its earnings and expenses, capital invested, etc. Taking into consideration proper compensation to the road and a proper rate, based on other considerations as well as a compensatory one, he pronounced the rate charged excessive and unreasonable, and fixed five cents on corn and eight cents on flour as the reasonable rate. Appellant's superintendent explained why the shipment was made to Pine Bluff and reshipment from there to Magnolia, instead of a direct shipment from Cairo to Magnolia, in this way: He was under the impression that a through rate theretofore in force from Cairo to Magnolia had been withdrawn. He afterwards learned this was a mistake, but, believing that there was no through rate, he thought he had better ship to appellant's local agent at Pine Bluff, and let him reship on a combination of local rates, rather than ship direct to McNeil on the St. Louis Southwestern Railway where he had no one to make reshipment over appellee's line from there to Magnolia. Pine Bluff is a city on the St. Louis Southwestern Railway, between Cairo and McNeil.

1. Appellee argues that the evidence of the railroad commission rate clerk was incompetent, because it was shown by the president and auditor of the company that the financial statement furnished the Railroad Commission by the former auditor was not correct, and showed a surplus, when it should have showed a deficit. The former report was duly verified by proper officers of the company, and was made pursuant to law, and was a competent basis from which to make estimate on proper compensation in rates, and was furnished for that purpose. It was open to appellee to show errors in it, but that did not destroy the admissibility of testimony based upon it unless the testimony against it was uncontradicted, reasonable, and consistent in itself, not weakened by cross-examination, nor its credibility impeached. If within the latter category, then the jury could not arbitrarily disregard it. The testimony against the report was not of such a character that it would have been an arbitrary and unwarranted action on part of the jury to have disregarded it. The rate clerk did not base his testimony entirely upon the financial statement, although it was one of the controlling factors. An attack is made upon the testimony of the former superintendent of appellant company. His testimony as to rates has heretofore been mentioned. He properly qualified himself as an expert to testify on the subject within the rules governing the qualification of experts. 1 Wigmore on Evidence, § 556; 5 Enc. of Evidence, pp. 517, 599; Rail-

way *v.* Bruce, 55 Ark. 65, 17 S. W. 363. The expert's evidence of a reasonable rate, based on special knowledge of rates under similar conditions, was properly admissible, although he did not have knowledge of the financial condition of the road and cost of transportation on this line, for a reasonable compensation is usually determined by usage or the amount commonly or customarily paid for like services under similar conditions. Johnson *v.* P. & P. Ry. Co., 16 Fla. 623, 26 Am. Rep. 731; L. E. & St. L. Ry. *v.* Wilson (Ind. Sup.) 21 N. E. 341, 4 L. R. A. 244; 4 Elliott on Railroads, § 1560; Hutchinson on Carriers, § 447; Ray on Neg. of Imp. Duties Freight Carriers, p. 845. See, also, 2 Elliott on Railroads, §§ 692, 663. The evidence of through rates and the division thereof on both ends of appellee line was also admissible. It would be fair to deduce therefrom that the appellee would not agree to maintain rates which were not fair and compensatory to itself, as well as reasonable for the services rendered. Of course, none of these matters were controlling, and it was open to appellee to remove them by a weight of evidence or explain them, but the facts adduced were competent and sufficient to go to a jury as tending to prove the matters charged, and the case should have been sent to the jury unless the matters urged by appellee presented legal obstacles.

2. Appellee says that appellant's action was based on state statutes regulating freight rates for interstate shipments, and that Congress has by statute covered the same field, and hence it cannot be maintained. If this is a statutory action, the proposition is correct. Railway *v.* Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; T. & P. Ry. *v.* Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Spratlin *v.* Railway, 76 Ark. 82, 88 S. W. 386. Originally this action was brought for overcharge, penalty, and attorney's fees, and it may fairly be inferred that the pleader was basing his action upon sections 6730, 6733, and 6621, Kirby's Dig. The penalty feature (section 6733) was stricken out and an amended complaint filed which seems to be in the language of, and pursuant to, sections 6730 and 6621, *supra.* It is conceded by appellant that under the decision in Porter *v.* Railway (Ark.), 95 S. W. 453, the facts in this case make the shipments in question interstate transactions, and they will be so treated. That decision was rendered after the trial of that case. "Reasonable and just" rates are a subject of legislation in section 1 of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], and therefore the subject-matter of section 6730, Kirby's Dig., is covered by the congressional legislation, and the state statute is ousted from applying to interstate transactions. Appellee contends that this ends the case, and so it does unless the complaint, and facts adduced to support it, can be sustained as a good common-law action.

Section 22 of said interstate commerce act provides: "And

nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Act Feb. 4, 1887, c. 104, 24 Stat. 387 [3 U. S. Comp. St. 1901, p. 3171]. At common law the carrier could charge reasonable remuneration for the services performed, and no more. The reasonableness of the charge is determined by similar services under like condition, the cost of service, fair compensation for capital invested, and the manifold elements entering into it which make rate making one of the problems of the age. The common law went no further in this regard than to demand that the charge be a reasonable and fair one. Johnson *v.* P. & P. Ry., 16 Fla. 623, 26 Am. Rep. 731; Hutchinson on Carriers, § 447; 4 Elliott on Railroads, § 1560; Ray on Freight Carriers, p. 845. It follows that section 6730, Kirby's Dig., is but declaratory of the common law, and a complaint good under one is good under the other. Is there a common law "in interstate transactions"? Let Mr. Justice Brewer answer it: "There is no body of federal common law separate and distinct from the common law existing in the several states in the sense that there is a body or statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. * * * Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, * * * and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment." W. U. Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 Sup. Ct.: 561, 45 L. Ed. 765. See, also, Judson on Interstate Commerce, § 66.

Appellee insists that a suit to enforce a common-law right growing out of an interstate shipment is a matter of primary and exclusive jurisdiction in federal courts, and cites to sustain that position a decision by Judge Grosscup. Swift *v.* Railroads (C. C.) 58 Fed. 858, decided in 1893. This decision is bottomed on the proposition that the common-law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate transactions, and that such an action is purely one based on the interstate commerce act. If Judge Grosscup's premise was right, his conclusion would be sound, for the jurisdiction to enforce statutory rights conferred by the interstate commerce act of 1887 is conferred on United States courts by section 8 of said act (24 Stat. 382 [3 U. S. Comp. St. 1901, p. 3159]). But Judge

Grosscup's premise was wrong and directly in opposition to the principles announced eight years later in the decision quoted from. The court is unable to see any reason why the state courts may not entertain jurisdiction of a suit based on common-law rights flowing from an interstate shipment when Congress has expressly declared that such remedies are not ousted by the legislation on the subject of interstate commerce, but that such legislation is in addition to existing common-law remedies. Chief Justice Conner for the Court of Civil Appeals in Texas so fully and completely reasoned out in principle and on authority the soundness of this position that he left nothing further to be said on it. Abilene Cotton Oil Co. *v.* T. & P. R. Co. (Tex. Civ. App.) 85 S. W. 1052, 1053, and the same case in 60 Cent. Law J. 468, where an interesting note is found. Appellant was entitled to go to the jury with its case.

Reversed and remanded.

STAPLES *v.* RHODE ISLAND SUBURBAN RY. CO.

(Supreme Court of Rhode Island, April 9, 1906.)

[67 Atl. Rep. 431.]

Evidence—Similar Transactions.*—In an action by one whose hand was crushed between the guard rail on which it was laid and some part of a car being passed on another track, evidence that at various times before the accident cars similar to those involved therein had been heard and felt to scrape together when passing each other at or near the place of the accident was admissible.

Carriers—Carriage of Passengers—Personal Injuries—Management of Conveyances.†—A street railroad company is liable for injuries resulting from such a condition of its tracks as permits passing cars to come in contact with each other.

Exceptions from Superior Court, Providence County.

Action by Levi Staples against Rhode Island Suburban Railway Company for personal injuries. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled, petition for new trial denied, and case remitted for judgment on the verdict.

John W. Hogan, for plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and *Alonzo R. Williams,* for defendant.

*See foot-note appended to Atchison, etc., Ry. Co. *v.* Fronk (Miss.), 22 R. R. R. 94, 45 Am. & Eng. R. Cas., N. S., 94.

†See extensive note, 3 R. R. R. 525, 26 Am. & Eng. R. Cas., N. S., 525; extensive note, 2 R. R. R. 776, 25 Am. & Eng. R. Cas., N. S., 776.

PER CURIAM. The defendant's exceptions all relate to the introduction of the testimony of witnesses that at various times before the accident cars similar to those involved in the accident had been heard and felt to scrape together when passing each other at or near the place where this accident occurred. This testimony was clearly admissible, and was corroborated by the defendant's own witness Purrington. This evidence might be incredible if there had been no change in the tracks after the accident and before the trial; but there was evidence, also, that the tracks had been changed with the very purpose of avoiding the contact of cars passing each other, and it was not clearly shown that all work of this character preceded the accident.

Upon the whole evidence we cannot see how the jury could have come to any conclusion other than that the plaintiff's hand was crushed between the guard rail, upon which it was laid, and some projection, probably a step, upon the box car. For such a condition of the tracks as would permit this collision the defendant is liable. The damages were not excessive. On the contrary, we consider them less than might reasonably have been assessed.

The exceptions are overruled, and the petition for a new trial is denied. The case will be remitted to the superior court for judgment on the verdict.

HORNE *et al. v.* SOUTHERN RY.

(Supreme Court of South Carolina, Sept. 3, 1907.)

[58 S. E. Rep. 963.]

Trial—Instructions—Preponderance of Evidence.—Where, at the beginning of his charge, the court, in the clearest language, placed on plaintiff the burden of proving by preponderance of evidence the allegations that the negligence of defendant was the proximate cause of the injury to plaintiff, a verbal slip placing on defendant the burden of proving contributory negligence by preponderance of evidence, which might be construed to mean that the primary inquiry was whether defendant had made out such a defense, was not misleading.

Same.—Where, in instructions concerning contributory negligence, there was language which might bear the meaning that defendant could not rely on the position that plaintiff's injury was due entirely to her own negligence, unless it proved that fact by the preponderance of evidence, it was not misleading, when the court charged that the plaintiff must show that defendant's negligence was the proximate cause of the injury.

Horne *v.* Southern Ry

Carriers—**Duty to Invalid Passenger.***—A carrier is bound to render reasonable assistance to a passenger whose inability to take care of himself is made known to the carrier.

Trial—**Instructions—Construing Charge as a Whole.**—An instruction that the negligence of defendant carrier entitled plaintiff to recover punitive damages if it intentionally injured her, "injured her carelessly, did not care whether she suffered injury or not. That is meant by willfulness"—was not ground for reversal, where, from all that was said on the subject taken together, the jury could not have failed to understand punitive damages could be recovered only for willful or wanton misconduct.

Appeal from Common Pleas Circuit Court of Spartanburg County; Klugh, Judge.

Action by Mary Louisa Horn and Ben Horn against the Southern Railway. Judgment for plaintiffs. Defendant appeals. Affirmed.

Sanders & De Pass, for appellant.
De Pass & De Pass, for respondents.

WOODS, J. The plaintiff Mary Louisa Horn, her husband, John Horn, and her adult sister on March 5, 1905, were passengers from Union to Jonesville on the defendant's train. The action was brought for injuries alleged to have been received by the plaintiff in a fall due to the turning of a stool placed on the ground to aid passengers in alighting.

The plaintiff testified she had several parcels, and asked the conductor to help her when she reached Jonesville; that her husband preceded her in getting off the train with their baby in his arms; that neither conductor nor porter rendered her any assistance; that, when she stepped from the car with a clothes case in one hand, a hat and umbrella in the other, the stool turned and threw her to the ground because it was not set in the right place; that the conductor was standing on the ground where the passengers were alighting, saw her fall, and, so far from offering her assistance, actually laughed at her. The conductor testified he had no recollection of the request for assistance; that he did take the arm of the plaintiff as of other women to aid them in stepping off; that the stool was placed in exactly the proper place, but he observed the plaintiff come down the steps looking over at the crowd, and not at the stool; that the plaintiff merely staggered

*For the authorities in this series on the subject of the duties and liabilities of the carrier as affected by the infirmity or helpless condition of the passenger, see foot-notes appended to Illinois Cent. R. Co. *v.* Cruse (Ky.), 21 R. R. R. 145, 44 Am. & Eng. R. Cas., N. S., 145; foot-notes appended to Illinois Cent. R. Co. *v.* Allen (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49, where all the preceding authorities in this series are collected.

around without falling, and made no complaint whatever. He denied laughing at the plaintiff. His testimony that a number of other passengers had preceded the plaintiff and alighted in safety was not disputed. There was some evidence that the place where the car stopped was not quite level, but this was denied by the conductor. This statement makes the issues of fact sufficiently clear. The jury found a verdict in favor of the plaintiff for $800. The appeal relates to alleged errors in the charge of the circuit judge. We do not think there is any ground upon which this court can interfere with the judgment.

1. In imposing upon the defendant the burden of of proving contributory negligence by a preponderance of the evidence, the circuit judge by a verbal slip used language which might be construed to mean that the primary inquiry was whether the defendant had made out the defense of contributory negligence, rather than whether the plaintiff had proved the defendant's negligence as a proximate cause of injury. But at the beginning of the charge, in the clearest language, he had placed on the plaintiff the burden of proving by the preponderance of the evidence the allegation that the negligence of the defendant was a proximate cause producing injury to the plaintiff, and had charged the plaintiff could not recover without discharging this burden. So, taking the instruction on this point as a whole, we do not think it could be inferred the jury were misled.

2. There is also language in the charge, which, standing alone, would bear the meaning that the defendant could not rely on the position that the plaintiff's injury was due entirely to her own negligence, unless it proved that fact by the preponderance of the evidence. But this language was used in the instructions concerning contributory negligence. It would be going too far to infer misapprehension by the jury on this point; for the instruction that the plaintiff could not recover without proving affirmatively by the preponderance of the evidence her injury to have been due to the negligence of the defendant certainly negatived the idea that she could recover unless the defendant assumed and discharged the burden of proving by the preponderance of the evidence the injury to have been due entirely to her negligence. The burden of proving the defendant's negligence as the proximate cause would imply to any reasonably intelligent mind the burden of proving the absence of the plaintiff's negligence as the sole proximate cause. The charge, therefore, does not warrant a reversal on the authority of Kennedy *v.* So. Ry. Co., 59 S. C. 535, 38 S. E. 169, and Michiner *v.* Telephone Co., 70 S. C. 525, 50 S. E. 190. If inadvertences like those relied on here are deemed by council to be material, they should be called to the attention of the circuit judge at the close of the charge. If they escape the attention of vigilant and learned counsel, this court ought not to infer they were so grasped by the jury as to lead them into error.

3. The defendant submits in the next place the following was a charge on the facts: "Well, now, I instructed you that it was bound to furnish passengers with safe and proper appliances and facilities for riding on its trains. Now, if that included the assisting of passengers from the train by the railroad company's handling whatever parcel or package the passenger has, if a railroad company of ordinary prudence would do that, then in this case it is bound to do that. As a matter of course, the railroad company, no more than any other individual, can be held to do that which is impossible, and the railroad company must go upon appearances as the facts and circumstances make these appearances, and if a passenger is burdened with baggage and the employee of the railroad company sees that, why, the railroad company is bound to, if it becomes necessary to the safe alighting of the passenger from the train, for the railroad company to assist in handling any package or boxes. Now, it is the duty of the railroad company to do that. It is not the duty of the railroad company to go through the train, and see each passenger to know whether he wants assistance, or to ascertain what baggage he might happen to have to get off with. But if it is apparent, and would be apparent to a person of reasonable observation that the passenger is in need of assistance, then the railroad is bound to furnish assistance just the same as it is bound to assist a person in any other way prevented from safely alighting without assistance, if the person is sick or aged or infirm, or in any peculiar circumstances which are apparent to the railroad company or comes to the knowledge of the railroad company, which renders a greater degree of care necessary, why the railroad company is bound to afford that additional assistance, and exercise that additional degree of care if such appearances are obvious. As a matter of course, the railroad company is not bound to exercise that same degree of care in the case of an ordinary person alighting from its train." We do not discern in this language anything more than a fair statement of the law as to the duties of a carrier to passengers on its train.

The courts seemed at one time inclined against holding a carrier bound to aid in the alighting even of a passenger manifestly disabled from sickness or infirmity; the view being that such a passenger in undertaking a journey should provide for his own assistance. But it is now generally held that the carrier is bound to render reasonable assistance to a passenger whose inability to take care of himself has been made known to the carrier. Simms v. Railway Co., 27 S. C., 268, 3 S. E. 301; Doolittle v. Railway Co., 62 S. C. 130, 40 S. E. 133; Madden v. Railway Co., 41 S. C. 440, 19 S E. 951, 20 S. E. 65.

No doubt justice requires the exercise of great caution on the part of the judges in stating this principle of law, and on the part of the juries in applying it, especially when negligence is charged

against the carrier for failing to assist a passenger incumbered with parcels. As a general rule, it is not the duty of the carrier to provide servants to carry hand parcels. Considering the number of passengers usually on a car and the unreasonable burden it would be on the railroad to employ attendants enough to assist all of them, as a general rule, passengers ought not to incumber themselves with parcels they are not able to carry with safety. But there are exceptions to these rules which the carrier must recognize when brought to his notice, especially where assistance is asked, in form of the aged or mained or sick, or children, or adult persons traveling with small children who may be unable to carry the parcels usually allowed to the passenger as reasonably necessary. The charge of the circuit judge did not impose any greater burden on the carrier than the duty to take notice of such exceptions.

4. The fourth exception relates to the following instruction: "Well, now, the plaintiff claims not only damages to compensate her for loss or injury, but also claims punitive damages. She claims the railroad was wanton and willful in its negligence, and therefore it ought to be punished by the awarding of damages, besides any damages which may be awarded for her actual injuries or loss. That's what is meant by punitive or vindictive damages, damages to punish a wrongdoer. In this case the plaintiff claims the railroad company was a wrongdoer, and ought to be punished because it injured her willfully and wantonly; that is, it intentionally injured her, and that it injured her carelessly, didn't care whether she suffered injury or not. That is what is meant by willfulness. If you find that the railroad company did injure plaintiff and was either willful or wanton, and willed to do her injury, an intentional injury, that makes a case where the railroad company ought to be visited with such punishment as will prevent it from being willful or careless, or wantonly injuring a passenger or any other person in the future." The defendant submits this charge was erroneous, in that (1) "there is no evidence in the case to warrant the submission to the jury of the question of punitive damages"; (2) by this charge his honor made the terms "willful" and "careless" synonymous, and instructed the jury that a verdict for punitive damages could be given if the defendant "either willfully, intentionally, or carelessly injured the plaintiff." The use of the word "carelessly" in stating the basis of punitive damages was not fortunate, as it is more nearly synonymous with "negligently" or "inadvertently," than with "willfully" or "wantonly." But, taking all that was said on the subject together, the jury could not have failed to understand punitive damages could be recovered only for willful or wanton misconduct.

The sworn statement of the plaintiff that, when she fell, the conductor made no effort to aid her, and laughed at her, is some evi-

dence of wanton misconduct. The court cannot interfere with the right of the jury to pass on the credibility of the testimony. But, in addition to this, there was no motion for nonsuit as to punitive damages, nor request to charge that there was no evidence upon which punitive damages could be recovered. Jennings *v.* Edgefield Mfg. Co., 72 S. C. 411, 52 S. E. 113.

The judgment of this court is that the judgment of the circuit court be affirmed.

ATCHISON, T. & S. F. RY. CO. *v.* BOURDETT.

(Supreme Court of Kansas, June 9, 1906.)

[85 Pac. Rep. 820.]

Carriers—Refusal to Deliver Freight.*—A railway company received a shipment of freight with the freight charges paid in advance. At the point of delivery its local agent demanded payment by the consignor of additional freight charges under a different classification, and also payment of a former freight bill, which he conceived to be due the company from the same consignor for a previous shipment of the same article, and refused to deliver the shipment unless these additional sums were paid. After withholding possession for seven days, the company made delivery without requiring payment of either claim. Held, in an action for damages, that the demand for payment of charges for a former shipment and refusal to deliver unless such demand was complied with render the withholding unlawful, and preclude any inquiry into the merits of the other demand, and the company is liable for the value of the use of the shipment for the time it was unlawfully withheld.

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swartz, Judge.

Action by Douglas Bourdett against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Douglas Bourdett brought this action against the railway company to recover damages on account of the willful and unlawful withholding of a freight shipment. He was employed in the business of drilling wells for gas and oil, and operated a well-drilling outfit in Cowley county. On July 2, 1904, the drill was

*See extensive note, 22 R. R. R. 247, 45 Am. & Eng. R. Cas., N. S., 247.

broken, and for the purpose of having it repaired he delivered it to the railway company at Winfield for shipment to Independence, consigned to Bovaird & Co., a firm doing general repair work at that place, and prepaid the freight charges thereon. Upon the arrival of the drill at Independence, Bovaird & Co., having been notified, had their fires and men ready to begin work at once upon the repairs, expecting to complete the same within five hours and reship to Bourdett. They demanded the drill and were in the act of unloading it from their side track, when informed by the agent of the railway company at Independence that it would not be delivered until an additional sum was paid, amounting to $38.20. A bill was presented to them by the agent's clerk for this amount, made up of two separate items, and one of $18.80 additional freight charges, and one of $19.40 which the agent claimed was due on a prior shipment of the same drill. As soon as he was notified by Bovaird & Co. of the refusal to deliver the shipment, Bourdett saw the railway agent at Winfield about the matter, who informed him that the agent at Independence had exceeded his authority, and that he would wire him to release the shipment. After a second letter from Bovaird & Co., he again called upon the Winfield agent and was told that the agent at Independence was inclined to be stubborn; that he had repeatedly wired him, but could get no answer. The railway company held the shipment from the morning of July 5th to the afternoon of July 11th, and then the agent at Independence released it upon a telegraphic order from the auditor to deliver the shipment as if it had been loaded in a box car and without demanding the extra charges. It was repaired on the 12th of July and reshipped to Winfield on the same flat car and at the same rate. It appeared that the railway company was informed of the purpose of the shipment at the time it was received at Winfield and during the time it was withheld at Independence.

In the petition it was alleged: "That the defendant, without any legal reason or excuse therefor, but for the purpose of annoying, delaying, and injuring this plaintiff, and after having received in advance the full freight charges for said shipment, and after having been informed and well knowing that said shipment was made for the purpose of having the same repaired, and that any delay upon its part would cause the plaintiff annoyance and damages, willfully withheld the possession thereof, and refused and prevented the said Bovaird & Co., the possession of said shipment for the period of eight days. That the said Bovaird & Co. were ready, willing, and able to repair said shipment and reship the same to plaintiff within five hours after its receipt. That by said wrongful and unlawful acts of the defendant this plaintiff was deprived of the use of said shipment, and that its use was worth the sum of $20 per day, and that by reason thereof this plaintiff has been damaged in the sum of $160." It was also alleged that

the failure to deliver the drill caused defendant in error to lose the well upon which he was at work at the time the drill broke. Upon the trial the jury returned a verdict in favor of defendant in error for $200, and found in answer to special questions that the damages to the well amounted to $60, and the value of the use of the drill for the time it was withheld was $140. Defendant in error remitted the amount of damages allowed for the loss of the well, leaving only the damages for loss of the use of the drill in controversy.

Wm. R. Smith, O. J. Wood, and *Alfred A. Scott,* for plaintiff in error.

O. P. Fuller, for defendant in error.

PORTER, J. (after stating the facts). Plaintiff in error demurred to the evidence, which was overruled. It also asked for a peremptory instruction, which was denied. Error is assigned upon these rulings of the court, and it is contended that defendant in error failed to make a *prima facie* case, because there was a failure of proof of the allegation in the petition that the company willfully and without any legal reason or excuse withheld the shipment from the consignee at Independence. It is urged that plaintiff's evidence shows that the shipment was not delivered because of refusal to pay the additional freight charges demanded; that as a matter of law it devolved upon plaintiff below to prove that the charges were exortionate, illegal, unreasonable, or in excess of the regular tariff rate charged other persons for like shipments. The railway company on the trial sought to excuse its demand for the additional freight charges on the ground that, as the stem of the drill was too long to go in a box car with side doors, it was shipped on a flat car, and thereby became subject to a minimum charge equal to the charge for 5,000 pounds at firstclass rate under the Western Classification, which made the charges amount to $23, and that the difference between this and the $4.20 prepaid was the $18.80 demanded by the agent at Independence.

Plaintiff in error insists that it is the law that the shipper must tender the freight charges before he is entitled to possession; that if he believes the charges extortionate or unreasonable he may pay under protest and sue to recover the excess, or, it is said, he may bring his action in replevin to recover the possession; and, because defendant in error pursued neither of these remedies, it is argued that he cannot maintain an action for damages for withholding the possession. If, before he is entitled to possession, he must tender the freight charges, his action in replevin would fail, because tender had not been made. Again, if it be true that he can maintain an action in replevin, he could, in the same action, recover damages for the unlawful withholding; and it is argued by defendant in error that, having obtained possession without replevin, he should be allowed to maintain an action for

damages alone. It is assumed in the argument of plaintiff in error as well as in the entire brief that, as a matter of fact, the drill was withheld by the agent at Independence for refusal to pay $18.80 freight charges. The evidence of defendant in error was that the agent's clerk notified Bovaird & Co. that the drill would not be delivered until $38.20 was paid, including not only the extra freight which the company claimed as due under the Western Classification, but an old account of $19.40, which the agent said was due from the consignor for shipping the same drill several months previously.

The jury in their answers to special questions found this to be the fact. It will not be necessary in our view of the case to consider the questions suggested by plaintiff in error as to the relative rights of the parties, and the remedies of a consignor of freight in a case where the refusal to deliver was for the failure to pay freight charges, nor to inquire what effect the prepayment of the freight charges demanded at the point of shipment had upon the rights of the consignor to immediate delivery. Under any theory which might be taken of these questions, the fact remains that the agent of the railway company at Independence included in his demand and insisted upon payment of a claim which did not arise out of the contract for shipment and which had no possible connection with it. With as much propriety he might have withheld delivery until a claim of the passenger department, which he conceived to be due the company, or a board bill of his own against the consignor, was paid. In view of the arbitrary conduct and unreasonable delay of the railway company, every presumption should be indulged in favor of the judgment in this case.

It is attacked as an allowance of speculative damages, as not supported by any evidence showing actual loss of the use of the drill for seven days, and because it is said the wages of the men employed by defendant in error was considered by the jury in determining the value of the use. There was some evidence that the use of the drill to defendant in error was worth $20 per day, and that the delay in the delivery of it occasioned the loss of at least seven days' use, under the circumstances, sufficient, we think, to support the verdict. It is immaterial, therefore, that the jury disregarded the evidence in their special finding in reference to the usual and ordinary freight charges for similar shipments, and in answer to the question whether the railway company used in its business a book known as the "Western Classification." The action of the company in withholding delivery for refusal to pay a claim wholly disconnected with the contract of carriage precludes an inquiry into the merits of its other demand.

We have examined the other errors suggested, but find nothing requiring a reversal.

The judgment therefore will be affirmed. All the Justices concurring.

TILBURG *v.* NORTHERN CENT. RY. CO.

(Supreme Court of Pennsylvania, April 22, 1907.)

[66 Atl. Rep. 846.]

Carriers—Expulsion of Passenger—Damages.*—A carrier is liable for expulsion of a passenger at a dangerous time or place, not only for the injuries directly suffered, but also for subsequent injuries proximately due thereto.

Same—Questions for Jury.—In an action to recover for the death of a passenger expelled from a train at a flag station and on a stormy night for failure to produce his ticket, where he was afterwards found dead, apparently having been killed by a locomotive, whether the servants of the carrier were guilty of negligence and whether deceased exercised due care were questions for the jury.

Appeal from Court of Common Pleas, Lycoming County.

Action by Mary Tilburg against the Northern Central Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and STEWART, JJ.

Otto G. Kaupp and *M. C. Rhone,* for appellant.
Seth T. McCormick, for appellee.

MESTREZAT, J. This is an action of trespass to recover damages for the death of Robert D. Tilburg, the plaintiff's husband. In the afternoon of January 3, 1905, he and his son Edward purchased tickets at Williamsport, Lycoming county, over the defendant's road for Cogan Valley Station. At the same time one Charles Stamets purchased a ticket for Haleeka, a flag station about one mile beyond Cogan Valley, and the three parties entered and took seats together in a coach of the same train. Soon after the train left Williamsport the con-

*For the authorities in this series on the subject of the damages recoverable against the carrier for refusal to transport a passenger, or delay in transporting him, or for his wrongful ejection, see foot-notes appended to Sappington *v.* Atlanta & W. P. R. Co. (Ga.), 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846; foot-notes appended to Louisville & N. R. Co. (Ky.), 21 R. R. R. 299, 44 Am. & Eng. R. Cas., N. S., 299.

For the authorities in this series on the subject of the right to recover on account of future suffering, in actions for personal injuries, see foot-notes appended to Chicago, etc., Ry. Co. *v.* Lindenan (C. C. A.), 20 R. R. R. 549, 43 Am. & Eng. R. Cas., N. S., 549; foot-notes appended to Norfolk Ry. & Light Co. *v.* Spratly (Va.), 20 R. R. R. 260, 43 Am. & Eng. R. Cas., N. S., 260.

ductor asked Tilburg for his ticket, who, after searching his pockets, informed the conductor that he had a ticket for Cogan Valley, but was unable to find it. The conductor then told Tilburg to look for his ticket and he would return, which he shortly did, after taking up the tickets of the other passengers. He again asked Tilburg for his ticket, and was again informed by Tilburg that he had a ticket, but could not find it. The conductor then made inquiry of Stamets, who was present when Tilburg purchased his ticket, and was informed by Stamets that Tilburg had purchased a ticket from Williamsport to Cogan Valley. The son, Edward Tilburg, also gave the conductor the same information. About that time the brakeman announced Cogan Valley station. Edward Tilburg arose from his seat to leave the train and went to the door of the coach and on the platform. At the same time his father got up from his seat, but the conducor stood at the entrance to the seat with his hand on Tilburg's shoulder, demanding the ticket or the fare, and would not permit Tilburg to leave the coach, telling him that he, the conductor, must have the ticket or the fare before they came to the next stop, "or he would take care of him." The train stopped only a minute at Cogan Valley. Edward Tilburg alighted, but his father was still on the train. The conductor continued to demand the ticket or payment of his fare until the train arrived at Haleeka, where it stopped. Here the conductor put Tilburg off the train. Stamets, who was present and also alighted from the train, says that the conductor shoved Tilburg "down off the step." This was at 5 o'clock in the evening, and it was dark. Edward Tilburg testified that "it was storming when the train left Williamsport, and that in the evening it was snowing and blowing terrible cold, very cold, the coldest day we had last winter"; that it had been storming since the day before; and that there were four inches of newly fallen snow on the ground. Stamets testified: Q. Standing at the Haleeka flag station, at the point where Robert Tilburg was ejected, at the time that you say that he was ejected, what could you see of the surrounding country? A. Couldn't see anything. Q. Why? A. It was dark and stormy, and the wind was blowing very hard, and you couldn't see anything." Stamets says there was no house or place of shelter at the station. Tilburg was a stranger in that community, and had never been at the station before. The conductor gave him no information as to where he could find shelter or how he could return to Cogan Valley. After he had been ejected from the coach, Tilburg asked Stamets if he knew how he could get back to Cogan Valley station, and Stamets told him "the only way I knew was to go back down the railroad, because I didn't know any more about it than he did." The evidence does not disclose that there was any station house or other buildings at Haleeka in which Tilburg could secure shelter or protection from the storm, or in which he could

remain during the night. Nor did it appear whether there were any roads in that vicinity, or that there was any other practicable or safe way than the railroad by which Tilburg could have returned to Cogan Valley. After Tilburg had been ejected from the train, he started to return to Cogan Valley by way of the railroad. He was not again seen until his body was found along the railroad track the next morning about a quarter of a mile from Haleeka station. The ticket he had purchased at Williamsport for Cogan Valley was in his pocket. Fifteen or twenty minutes after Tilbugh's ejection from the train a freight train passed towards Williamsport, the direction in which Tilburg was walking. The evidence tended to show that he was killed by being struck by a locomotive. Upon these facts, the learned trial judge granted a nonsuit, which he subsequently refused to take off.

The nonsuit was granted solely on the ground that the plaintiff had failed to show affirmatively that the deceased could not have returned to Cogan Valley except by walking on the railroad track. The learned court, in its opinion refusing to take off the nonsuit, held "that it was the duty of the plaintiff to affirmatively show the necessity of the deceased to follow the railroad track towards his place of destination, and, having totally failed so to do, we granted the compulsory nonsuit now under consideration." We cannot agree with the learned trial judge in the disposition he made of this case. Having purchased the ticket and having taken his place in the coach of the defendant's train, Tilburg became a passenger, and it was the duty of the defendant's servants to treat him as such. The conductor was informed by Edward Tilburg and Stamets that Tilburg had purchased a ticket which entitled him to be carried from Williamsport to Cogan Valley. It was his duty, when requested, to deliver his ticket, and, after being given a reasonable time to find it and failing to produce the ticket or pay his fare, the conductor could have expelled him from the train. This could have been done at Cogan Valley station, Tilburg's destination, which the train at the time was approaching, and at which it subsequently stopped. Tilburg desired to leave the train at that station, but was prevented by the conductor. This action on the part of the conductor was a clear misapprehension of his duty and an infringement of the rights of Tilburg. The train stopped at the station but a moment, hardly giving Tilburg an opportunity to alight if he had not been prevented from doing so. The train moved on, and the next station is a flag station. Here the conductor exercised his authority, and, if the only testimony submitted is believed, forcibly ejected Tilburg from the train at a time and place and under circumstances which a jury would have been fully justified in finding endangered the life of the passenger. If the case had been submitted, and the jury had so found, it would clearly have been negligence on the part of the carrier company. 2 Hutchinson on Carriers (3d Ed.) §§ 1082, 1084.

In 6 Cyc. 563, it is said: "The servants of the carrier should not expel a passenger (or even a trespasser) at a time or place which is dangerous, and the carrier will be liable in such a case, not only for injuries directly suffered in connection with such expulsion, but also for subsequent injuries proximately due thereto, such as injury from other trains which the ejected person could not reasonably avoid, the probable consequences of improper exposure, and the like." Under the facts disclosed by the evidence it was, therefore, a question for the jury to determine whether the conductor had exercised the care required of him in expelling the passenger from the train at Haleeka flag station. 2 Hutchinson on Carriers (3d Ed.) § 1083. As said by Mr. Justice Gordon in delivering the opinion of the court in Arnold *v.* Pennsylvania Railroad Co., 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542: "In the case in hand, the duty of the conductor in expelling the plaintiff from the cars at the time and place selected for that purpose was certainly one that was not strictly defined. It may be admitted that as a faithful officer he was obliged to eject Arnold from the train; but then the very important question arises: Did he, as the company's employee, properly discharge this obligation in dismissing the plaintiff from the car between the tracks of the railroad, on a very dark night, at a way station that, from the want of light in or about it, could not be seen? As everything in this proposition depends upon facts and circumstances, its solution was for the jury."

In the case at bar, while it is true the expulsion took place, at 5 o'clock in the afternoon, it was a January evening, and the uncontradicted evidence shows that it was dark. The lights were shining at Cogan Valley as the train passed. There were no lights at Haleeka station. A fierce storm was at the time, and had been since the previous day, prevailing in that community. The weather was extraordinarily cold, and the country was covered with snow to an extent which rendered it difficult to see any paths or roads which might exist at that place or might lead in the direction of Cogan Valley station. Under these circumstances, the duty of the conductor towards a passenger, or even a trespasser upon his train, certainly could not be determined as a matter of law by the court, so as to justify the conductor's action in expelling Tilburg from the train. If it had clearly appeared by the evidence of the plaintiff, and there is no other evidence in this case, that the passenger had been ejected in daylight and under circumstances which gave him an opportunity to protect himself from danger in returning to Cogan Valley, we would have another and an entirely different question before us. The plaintiff has shown the place where her husband was ejected, and the conditions under which he was ejected, and the facts as disclosed by her testimony are clearly sufficient to go to the jury on the question of the negligence of the defendant's servants in expelling the deceased

from the train. If, as contended by the defendant company, the deceased was expelled from the train at a safe place and under conditions which did not make the expulsion unsafe, those facts must be made to appear by testimony. It was not the province of the court to surmise whether there were roads leading from or to Haleeka station, or whether there were highways leading from that station to Cogan Valley, or whether there was a station house at Haleeka, or whether there was a clubhouse or other houses in that vicinity. These were matters which were not shown by the testimony, and which, therefore, did not justify the court in withdrawing the case from the jury.

After Tilburg had been expelled from the train, he was required to use reasonable and ordinary prudence in seeking shelter and in attempting to return to Cogan Valley. Under the circumstances, it was not negligence per se for him to walk on the railroad in going from Haleeka to Cogan Valley. As said in Ham v. Delaware & Hudson Canal Co., 155 Pa. 548, 26 Atl. 757, 20 L. R. A. 682, the cases cited by appellee which hold that a man who steps his foot on a railroad track, except at a public crossing, does so at his peril, have no application to the facts presented here. If, as alleged by the plaintiff, her husband was put off the train at Haleeka station at a time and under circumstances which imperiled his life, he was not guilty of negligence if, in escaping from the position in which he had been placed, he acted as a reasonably prudent man in walking on the defendant company's tracks. As pertinent and applicable to the facts of this branch of the case, we may here quote the language of the present Chief Justice in Ham v. Delaware & Hudson Canal Co., 155 Pa. 548, 553, 26 Atl. 757, 758, 20 L. R. A. 682: "The substantial controversy in this case is upon the standard of conduct required of a man who, like Ham, is wrongfully put on a railroad track, as to the time and manner of getting off. The learned judge below told the jury concisely, in affirming the plaintiff's thirteenth point, that 'all the care that was required of Ham, after being put off the car, was simply the ordinary care and diligence of a reasonably prudent man under the circumstances,' and again, in affirming the defendant's twenty-second point, that 'when Ham was placed upon the track it was his duty to leave the same at the earliest practical [practicable] moment, and if he did not do so, he was guilty of contributory negligence. * * *' That this was the proper rule for the guidance of the jury does not admit of question. Ham, as already noted, was put in a place of danger without fault of his own. He was bound to use care, diligence, and judgment to get out at the first opportunity; but, using these, he was not chargeable with responsibility for the result, and the standard of the care, diligence, and judgment he was bound to use was the common standard of the ordinary prudent and careful man." What avenue or avenues of escape were presented to

Tilburg that night, and whether he exercised prudence and care in selecting the railroad as the way for reaching his destination after his ejection from the train, were questions for the jury. He was a stranger there, and the darkness prevented him from seeing the real conditions as they existed. Snow covered the earth and hid from his view what lay beneath. Would a reasonably prudent man, under the circumstances, have started out into the darkness and the storm to hunt roads or paths unknown to him, and which might have existed, and thus subject himself to the dangers of the holes and pitfalls which might have been open to receive him? Or would he have taken the direct route, which lay along the defendant's tracks, to travel the mile required to reach his destination?

Again we may be permitted to quote as pertinent in this connection what was said in the Ham Case (page 555 of 155 Pa., page 759 of 26 Atl. [20 L. R. A. 682]): "Whether a safe road was there, or not, was only a part of the question. There still remained whether Ham with ordinary diligence and prudence could have seen it, and, seeing, ought to have taken it. A man familiar with the locality may take an uninviting path, knowing it will lead him aright, while a careful man, not knowing how it may turn out, nor even whither it may lead, may well be exonerated from negligence in not making the experiment, though it would in fact have been the best thing to do. The elements of prudent conduct on the part of Ham were too many and too varied to be determined except by the jury, and the rule laid down for the jury's guidance was in accordance with the settled law." Malone *v.* Pittsburg & Lake Erie Railroad Co., 152 Pa. 390, 25 Atl. 638, was an action for personal injuries by a woman who was wrongfully ejected from a train upon which she was a passenger at a regular stopping place, where there was no station house, but only a box car used temporarily as a station. A storm was prevailing at the time she was ejected. She started to walk back to the station from which she had started, and on the way was overtaken by a storm which injured her health. In affirming a judgment for the plaintiff, the present Chief Justice says (page 393 of 152 Pa., page 638 of 25 Atl.): "We start with the fact established by the verdict that plaintiff was wrongfully put off the train, at a regular station to be sure, but one where she was a stranger, and where there was at the time no regular station house. She was in no fault herself, and, being thus put in a position of embarrassment and difficulty, she was not bound to use the best judgment, but only to good faith and reasonable prudence. Penna. R. R. Co. *v.* Werner, 89 Pa. 59." Whether the servants of the carrier company were guilty of negligence in carrying Tilburg beyond Cogan Valley station, or in putting him off at Haleeka station, which in either case proximately resulted in his death, and whether he exercised the care required of him after he had

alighted at Haleeka station, are questions which should, under proper instructions, have been submitted to the jury. The nonsuit was improperly granted, and the judgment must be reversed.

The assignments of error are sustained, the judgment is reversed, and a procedendo is awarded.

LOUISVILLE & N. R. CO. *v.* GADDIE.

(Court of Appeals of Kentucky, June 6, 1907.)

[102 S. W. Rep. 817.]

Carriers—Failure to Discharge Passenger at Station—Duty of Carrier—Evidence.—In an action against a railroad for failure to discharge plaintiff at her destination, evidence that defendant's conductor did not know of any other train following him was inadmissible as a basis for an argument that the conductor should have run his train back to plaintiff's station and let her off there.

Same—Damages.*—In an action against a railroad for a failure to discharge plaintiff, a passenger, at her destination, her recovery should have been limited to such loss of time, illness and inconvenience suffered as was the natural and reasonable result of being carried by her station.

Appeal from Circuit Court, Nelson County.

"Not to be officially reported."

Action by Sarah E. Gaddie against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

John S. Kelly and *Benjamin D. Warfield,* for appellant.

J. Smith Barlow and *John A. Fulton,* for appellee.

O'REAR, C. J. Mrs. Sarah E. Gaddie, appellee, was a passenger on one of appellant's passenger trains. By mistake the conductor failed to announce the station at which she was to get off, and carried her by it. Discovering the error, he notified her, and told her he would put her off at the next station, about three miles from her destination; but that on the returning passenger train, due in two or three hours, she would be carried back to her station. She refused to get off the train; but, being urged by the conductor, did grumblingly alight. The weather was warm and the time was about the middle of the day. She was placed in charge of the station agent. He, learning where she wanted to

*See preceding case, and foot-note.

go, telephoned to her daughter, who sent a buggy for her, and took her to her destination. The difference in distance was about two miles, as she would have been compelled to travel some part of the journey in a buggy, even if she had been put off at the right station. She was accompanied by her little girl, about nine years old. She complained that the child was ejected from the train by force. But we fail to see any evidence of that fact. What occurred was the conductor took the child by the arm and helped her off the car. Appellee says the conductor's manner was rough toward her. But she details the facts, and we do not find any evidence of mistreatment or incivility. Appellee claims she was made sick and nervous by being put off at a strange place. She was already sick, and seems to be of a very nervous temperament. But there is nothing to warrant the assessment of punitive damages such as was permitted by the instructions in this case, and evidently considered by the jury.

Appellee proved that the conductor did not know of any other train following his, and ought, therefore, to have run his train back to the station and let appellee off there. We do not think this evidence or any argument based upon it proper in this case. For aught the conductor knew, there may have been another train following his. He could not know, and ought not to hazard guessing about such an important matter. Besides, trackmen and hand cars might have followed his train out, relying on its proceeding on its schedule time. And it would have been grossly negligent in either event for the conductor to have run his train back that distance without orders.

We think the only question in this case is to what extent appellee was entitled to recover for her loss of time and inconvenience suffered by her and any aggravation of her illness caused by reason of having been carried by her station and put off at the wrong one. Her recovery should be limited to such loss of time, illness, and inconvenience suffered as was the natural and reasonable result of being carried by her station.

Judgment reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

O'GARA *v.* ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 2, June 11, 1907.)

[103 S. W. Rep. 54.]

Carriers—Street Railroad—Passengers—Care Required.*—A street car company as a carrier of passengers is bound to exercise the highest care and skill for the safety of passengers that a prudent man would exercise in a like business and under like circumstances.

Same—Injury to Passenger—Res Ipsa Loquitur.†—Where a street car passenger was injured by the derailment of a car caused by a brick on the track, plaintiff established a prima facie case by proof of her relation as a passenger, and that she was injured by the derailment of the car.

Same—Malicious Acts of Third Person—Negligence of Defendant's Servants.‡—Where plaintiff, a street car passenger, was injured by the derailment of a car caused by a brick maliciously placed on the track by a boy, and, though the motorman could have seen the brick in time to have stopped the car before striking it or at least reduced the speed so as to have prevented the derailment, he did neither, the malicious act of the boy was no answer to the street car company's liability for plaintiff's injuries.

Same—Instructions.—In an action for injuries to a street car passenger, an instruction that if, before plaintiff reached her destination, the car left the track and struck a post, causing plaintiff to be thrown from her seat and sustain the injuries complained of, she was entitled to recover, unless defendant showed by a greater weight of evidence that it could not have prevented such derailment by the exercise of the highest degree of care employed by a very careful railroad under the same or similar circumstances in maintaining its tracks in the same condition, and in the management and control of cars, etc., was proper.

Trial—Instructions—Conformity to Issues.—Where, in an action for injuries to a street car passenger by derailment, the charge given fully covered all the issues in the case and a vigilant watch ordinance in no manner affected it, the court did not err in refusing to charge that, while it was the duty of defendant's motorman to exercise that degree of care that a very careful motorman would be expected to use to avoid injury to plaintiff, it was also his duty to keep a vigilant watch for persons on or approaching the tracks,

*See foot-notes appended to Verrone *v.* Rhode Island Sub. Ry. Co. (R. I.), 21 R. R. R. 685, 44 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to Whilt *v.* Public Service Corp. (N. J.), 21 R. R. R. 423, 44 Am. & Eng. R. Cas., N. S., 423.

†See foot-notes appended to Spurlock *v.* Shreveport Traction Co. (La.), 22 R. R. R. 854, 45 Am. & Eng. R. Cas., N. S., 854.

‡See note, 2 R. R. R. 782, 25 Am. & Eng. R. Cas., N. S., 782.

especially children, and that if children immediately before the accident were running or playing about the track so as to be in danger, and defendant's motorman, seeing the children, was putting his car under control and sounding his gong in order to warn them, and while so engaged he failed to see the brick on the track which caused the derailment, etc., it was not a part of his duty to anticipate that a boy would run suddenly from the sidewalk and place a brick on the track.

Carriers—Injury to Passenger—Question for Jury.—Where a street car passenger was injured by the derailment of the car caused by a brick placed on the track by a boy some forty or fifty feet in front of the car, whether the motorman by the exercise of reasonable diligence could have seen the brick placed on the track, or could have seen it after it had been placed there for a sufficient length of time to have permitted him, with the means and appliances at his command, to stop the car, was for the jury.

Damages—Personal Injuries—Evidence.—Plaintiff, a married woman, 35 years of age and enceinte, was thrown from her seat in a street car by the derailment thereof against the seats and timbers of the car, striking on her abdomen and right chest. She was rendered unconscious for a few minutes, when she immediately went home and sent for a doctor. She suffered a miscarriage of a three months' fœtus on the succeeding evening, and was confined to her bed for six weeks. Her health was poor after she was able to get up, and her physician testified that she could never be entirely well without an operation, which would be necessarily dangerous, that he had continued to treat her up to the time of the trial, and that her trouble would require continued treatment. Two other experts, who had examined plaintiff under order of court, testified that she did not have a retroverted womb. Held, that a verdict allowing her $7,500 allowed to stand by the trial court was not so excessive as to indicate passion and prejudice.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Elizabeth O'Gara against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Priest, Edward T. Miller, T. E. Francis, and *F. S. Whitelaw,* for appellant.

A. R. Taylor, for respondent.

GANTT, J. This is an action by the plaintiff, Mrs. O'Gara, a married woman of the age of 35 years, to recover damages for personal injuries sustained by her while a passenger on one of defendant's street cars south-bound on Fourteenth street, at the intersection of Fourteenth and Mallinckrodt streets, in the city of St. Louis, on the twenty-third day of September, 1903, by the derailment of the car and the collision of that car with a telegraph

pole at or near the southwest corner of Fourteenth and Mallinckrodt streets. The action was originally brought against both the transit company and the United Railways Company of St. Louis, and on the trial of the case the United Railways Company obtained a dismissal under the ruling of the circuit court, and the cause proceeded to verdict and judgment against the transit company alone.

The petition, in substance, alleges that the defendant at all the times stated was a corporation by the virtue of the laws of Missouri, and owned, used, and operated the railway and car mentioned for the purpose of carrying passengers for hire from one point to another in the city of St. Louis; that on the twenty-third day of September, 1903, the defendant by its servants in charge of this south-bound car on Florissant avenue, in the city of St. Louis, received the plaintiff as a passenger thereon, and, for a valuable consideration by the plaintiff paid to the defendant, defendants undertook and agreed with the plaintiff to carry her safely to her point of destination on defendant's line, to wit, Eighth and Olive streets, but that defendant, unmindful of its duty in the premises, did by its servants in charge of said car so negligently and carelessly manage and control the same and by its servants in charge of maintaining its tracks and cars in repair did so negligently manage said track and cars and machinery and appliances that said car left said track at a point near Fourteenth and Mallinckrodt streets, and became derailed and ran across the street and collided with a telegraph pole, and thereby plaintiff was thrown down, striking the seats and timbers of said car, and was greatly and permanently injured upon her body, abdomen, back, and spine and chest, and sustaining permanent internal injuries, and her nervous system was permanently injured, and she, being pregnant, was, by said injuries, caused to suffer a miscarriage of a child about three months advanced towards birth, and plaintiff was otherwise injured and bruised upon her body and head; that by her injuries so sustained the plaintiff has suffered and will suffer great pain of body and mind, and her health and strength has been permanently destroyed, and her capacity to labor and earn money has been permanently impaired, to her damage in the sum of $15,000, for which she prays judgment. The answer of the defendant was a general denial. The trial of the cause resulted in a verdict for the plaintiff in the sum of $7,500.

There is practically no conflict in the testimony. The evidence without dispute showed that the defendant was operating the car and railway in question on the twenty-third day of September, 1903, and that plaintiff on that day was received by the defendant's servants as a passenger on one of defendant's cars south-bound College and Florissant avenues; that she paid her fare as such passenger; that while she was such passenger on said car, at or

near the north crossing of Fourteenth and Mallinckrodt streets, the car left the track and ran south across Mallinckrodt street and collided with a telegraph pole near the southwest corner of the two streets, and that thereby plaintiff was injured. The nature and extent of plaintiff's injuries will be considered in the course of the opinion in the discussion of the contention by defendant that the damages awarded her by the jury were excessive.

As to the cause of the derailment, the plaintiff testified that she did not know what was the cause. She did not examine the track. She heard that there was a stone on it, but she did not see it herself, as there was quite a crowd standing around there. There were a number of people standing around when she recovered her consciousness, and they said a brick was the cause of the derailment. On cross-examination she stated there was a schoolhouse right near where this accident occurred.

Warner Cliff, a police officer, testified that he was on the car at the time of the accident, and made an examination to ascertain the reason for the car leaving the track, and he saw a brick there just where the trucks left the track. The broken piece of the brick was still there on the track immediately after the derailment. The testimony showed that the accident occurred before noon of the day; that it was broad daylight at the time it happened, a bright pleasant day. Thomas Gadden, a passenger, at the time plaintiff was hurt testified that he saw the motorman trying to stop the car after it left the track until it got within four or five feet of the telegraph pole. He judged that the car ran about 30 feet before it struck the pole after leaving the track. He heard the bell ringing just before the car left the track. After the accident he saw a red brick on the track, the brick was right on the rail, and at a point where the wheel left the track part of the brick was crushed and lying on the rail. The track at the point where the car left it was straight. There was no curve, and no other railroad crossing there. Asked how far he could see an ordinary sized brick on the track in front of the car, he answered he could see it half a block, that his eyesight was ordinarily good.

On the part of the defendant, Mr. Edward J. Mash testified that he was a pessenger on the car in question, having boarded it at John and Florissant avenues; that he was sitting in the front seat of the car, and saw a small boy run from the west side of Fourteenth street to the track and lay a vitrified paving brick on the track, and then run away; that there was a school right near the track, and a number of children were playing on the track and on both sides of it, and the car was running at a moderate rate of speed, and was only 40 or 50 feet from the point on the track where the brick was laid when it was placed there. When the car struck the brick and left the track, the motorman

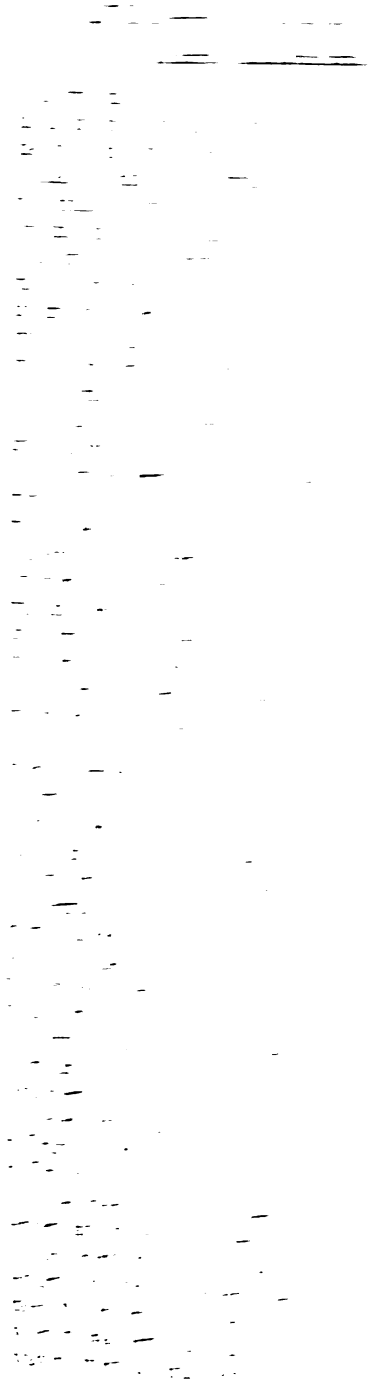
immediately wrapped his brake and tried to stop the car, which was going downgrade. The brick was eight inches long, two inches thick, and four inches wide, and hard as iron. Malcomn R. Rosson, the motorman in charge of the car, stated that the car was running about five miles an hour. He did not see the brick placed on the track, but saw it on the track in a crushed condition after the derailment. The car and the track and the car machinery were in good condition. He testified that there was a school near the place of the accident, and a number of children were playing around the track or both sides. He was ringing his gong and looking out for the children, and did not see the boy run out and place the brick which derailed the car on the track. He was on the platform of the car, trying to stop it, when the car struck the telegraph pole. He wrapped the brake and reversed his car, but the trolley came off when the car left the track, and so the reverse was of no effect. Kromer, the conductor, saw the crushed brick on the track after the accident, and saw the children prior thereto playing around the track, and heard the motorman ring the gong. John Wallace, defendant's track foreman, testified that the track was in good condition at the time of the accident, and no car had been derailed there since. Jacob Gell, a car inspector and repairer for the defendant, examined the car before and after the accident, and found it in good condition in all respects, except that after the accident the dashboard was damaged by coming in contact with the telegraph pole. Officer Cliff, recalled on part of the plaintiff, testified that he heard the motorman say he saw the boy put the brick on the track.

1. Did the circuit court err in refusing to sustain the defendant's demurrer to the plaintiff's evidence, either at the close of the plaintiff's case or at the close of all of the evidence? This question must be answered in the light of the law governing defendant's liability as a carrier of passengers. It is the settled law of this state that street car companies as carrier of passengers are held to the same degree of care and vilgiance in preventing injuries to their passengers as is required of other railroads carrying passengers for hire; that is to say, the highest care and skill which prudent men would use and exercise in a like business and under like circumstances. Jackson *v.* Railroad, 118 Mo. 199, 24 S. W. 192; O'Connell *v.* Railroad, 106 Mo. 482, 17 S. W. 494; Redmon *v.* Railroad, 185 Mo., loc. cit. 9, 84 S. W. 26, 105 Am. St. Rep. 558; Allen *v.* St. Louis Transit Company, 183 Mo. 411, loc. cit. 433, 81 S. W. 1142. In Hipsley *v.* Railway Co., 88 Mo., loc. cit. 352, it was said: "In the case of Lemon *v.* Chanselor, 68 Mo. 341 [30 Am. Rep. 799], we had occasion to consider the rights of a passenger and the duty under the law which that relation cast upon the common carrier, and it was there held that when the evidence shows that a passenger, without fault of his own, receives injury by the overthrowing or

breaking down of the vehicle in which he is being carried, a *prima facie* case is made out for him, and the onus is cast upon the carrier of relieving himself of the responsibility by showing that the injury was the result of an accident which the utmost skill, foresight, and diligence could not have prevented. This rule was applied in a case where horse power and a hack were used by the carrier for carrying passengers, and it applies with equal, if not greater, force when the more powerful instrumentality of steam is used as the motive power. While carriers are not insurers of the absolute safety of passengers, and are not responsible for inevitable and unavoidable accidents, regard for the safety of human limb and life has led to the adoption of the rule announced. It follows from this ruling that plaintiff having offered evidence tending to prove that he was a passenger on the defendant's train and that he was injured, without any fault on his part by the derailing of the train, made out a *prima facie* case entitling him to a verdict, unless it was rebutted and overthrown by the evidence of defendant showing that the accident was not the result of that want of care and vigilance which the law made it obligatory on the defendant to bestow." In Redmon *v.* Railroad, 185 Mo., loc. cit. 9, 84 S. W. 26, 105 Am. St. Rep. 558, the doctrine just cited was followed and approved. In Carpue *v.* Railroad, 5 Ad. & El. (N. S.) 747, where the injury was caused by a train running off of the track and overturning the carriage in which the plaintiff was a passenger, Denman, C. J., told the jury that, "it having been shown that the exclusive management both of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they give some explanation of the cause." In the case at bar, the defendant was the owner of and in the exclusive control of the track on which it propelled its cars. Plaintiff was a passenger in one of its cars, and, while sitting in her seat, she was injured by the sudden derailment of the car and its collision with a telegraph post on the side of the street. In short, under the plaintiff's case, it appeared that the injury arose from apparatus wholly and entirely under the control of the defendant and furnished and operated by it, and, such being the case, we think the court committed no error in overruling the demurrer to the plaintiff's evidence, because the plaintiff had made out a *prima facie* case of negligence against the defendant, and the burden was cast upon the defendant of showing that the accident was not the result of that want of care and vigilance which the law makes obligatory on defendant to bestow. Hipsley *v.* Railroad, *supra*; Redmon *v.* Railroad, *supra*. Defendant concedes that its duty is properly declared in the foregoing cases, but it insists that upon all the evidence plaintiff ought not to recover because the plaintiff's injuries were the result of the tortious act of a stranger over whom it had no control, to wit, the school boy who placed the brick on the track.

The plaintiff having made a *prima facie* case the burden devolved upon the defendant of showing that the derailment of its car was caused by the tortious act of the boy, and, if it could establish that plaintiff's injury was caused solely by the act of the boy or some third person placing the brick upon the track, then it must have shown the good legal excuse for the exemption from liability. The law makes each man liable for the consequences of his own negligent and wrongful act, but it does not attempt to hold him for the misconduct of another over whose acts he has no control, unless his negligence concurs with that other in causing damage. Wright *v.* Railway Co., L. R. 8 Excheq. 137; Bailey *v.* Citizens' Ry. Co., 152 Mo. 449, 52 S. W. 406. It is in view of this principle that the defendant insists that the court should have given a peremptory instruction upon the whole evidence in the case. The learned counsel for the defendant says: "What caused the derailment? There can be but one answer—the brick placed on the track by a boy. The question then arises, can the appellant, under these established facts, be liable to the plaintiff for injuries sustained in an accident so caused? And the answer must depend on how another question is answered, namely, did the motorman see, or by the exercise of ordinary care could he have seen the brick on the track in time to avert the accident?" Counsel then proceeds to argue that the motorman testifies he did not see the boy place the brick on the track, but concedes that the witness for the plaintiff in rebuttal testified that the motorman said he saw the boy put the brick on the track, but counsel argues that, whether the motorman saw or did not see the brick placed on the track, still there is no testimony to show that after the brick was placed on the track he could have stopped the car in time to avoid the accident. If we are to assume the absolute truthfulness of the witness for the defendant, Mr. Mash, the car was 40 or 50 feet from the boy when he placed the brick on the track. It was a bright, clear day, and the evidence on behalf of the plaintiff tended to show that the brick could be seen for a half block. The track was straight at this place with no curve, and the witness Mash was sitting in the car, and certainly did not have as good or at least was not in a better position to see the brick placed on the track than the motorman, who was standing on the front platform of the car. The motorman testifies that his car was moving at 5½ miles an hour at the outside. He testified that he saw some children playing around there, and there was one boy on the left-hand side of the track and another came out on the right-hand side, and there were some little children, little girls, just the other side of them on the east side of the track playing and he started to wind the brake to keep from running on them, and did not think about what the boy was doing, or whether he intended to do anything or not. On cross-examination he said: "I saw a boy when I was about

50 feet of him about to go out there. I did not see him put the brick on the track. I saw him running out there on the track. I saw him out there, and I rang my gong, and he wheeled and ran away." Asked if he could have seen the brick if he had looked, he answered, "Well, I did not see it." On redirect examination he stated "that the boy was about 50 feet from me when I saw him run out to the track and then run back. At the time he stopped and put it on I suppose I was 30 feet from him from the time he started away." Asked if he could not have stopped the car moving 5 miles an hour or 5½ miles an hour on a good track with the light load that he had, within five feet he answered he could not say but that he could not have stopped it "on a dead still" in the length of the car. On the other hand the officer stated that Rosson, the motorman, stated to him, and Mr. Gadden that he saw the boy put the brick on the track, but that he thought that he would run over it. Unquestionably it is the law as declared by the court that it was the duty of the defendant to maintain its track in safe condition, and, while it was not to blame in the first instance for the tortious act of the little boy in placing the brick on the track, it was its duty, if by the exercise of ordinary care its servants could have seen the brick upon the track in time to have avoided running over it and thereby derailing its car to have done so, and this issue was submitted to the jury in the instruction given on behalf of the defendant. If it was impossible with the means and appliances then at his command for the motorman to have stopped the car in time to avoid the derailment, then the defendant was not liable. But the rule already stated, which would exonerate the defendant on account of the little boy in placing the brick upon the track, only clothes the defendant with immunity when its own negligent act does not concur with that of the tortious act of the stranger in producing the damage. Keeping in mind always the obligation which the law places upon a common carrier of passengers to exercise that high degree of care in maintaining its tracks that a very prudent man would in like circumstances, it is obvious that it was the duty of the defendant, not only to have a well-constructed track in the first instance, but to use a high degree of care in keeping it free of obstacles which might cause a derailment of its cars. This was pithily put by Baron Bambell in Wright v. Midland Ry. Co., L. R. 8 Exchcq., loc. tit. 143, wherein he says: "Then Mr. Forbes puts this case. He says, supposing a carriage had been left by the North Western Company on the railway, that would be a nonfeasance, and there would be no liability upon the part of the defendant, because they did not put it there, and no liability upon the part of the North Western Company because they had no privity. I dissent from both propositions. If it had been left by the North Western Company upon the line, it would have been the duty of the defendants to have got it out



ercise of ordinary care, to have avoided striking the wagon, and the facts in each clearly distinguish them from the case at bar, in which all the evidence shows that the accident happened on a clear, bright day, on a perfectly straight track, and when the circumstances of the children being about the track of themselves call for the exercise of care and diligence at the point, and when the evidence shows that a passenger in the car saw the boy place the brick upon the track 50 feet in advance of the car, and the motorman, standing on the front platform, had the same or better opportunity to observe the tortious act. Neither are the cases of Sullivan *v.* Railway Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167, and Woas *v.* Transit Co., 198 Mo. 664, 96 S W. 1017, in both of which the company was entirely guiltless of any negligence whatever, and the acts which caused the injuries in those cases were the sole wrongful acts of a third party, at all like the case at bar. Accordingly we think the circuit court committed no error in refusing the peremptory instruction requested by the defendant at the close of all the testimony.

2. The defendant assails the instruction given for the plaintiff because it told the jury that if they find and believe from the evidence that while the plaintiff was a passenger upon said car, and before she reached her destination, to wit, at or near Fourteenth and Mallinckrodt streets, said car left the track and became derailed and struck a post, and that thereby plaintiff was caused to be thrown from her seat in said car and to sustain the injuries mentioned in the evidence, she was entitled to recover, unless the defendant showed by a greater weight of evidence that it could not have prevented such derailment by the exercise of the high degree of care of a very careful railroad employee under the same or similar circumstances in maintaining its tracks in safe condition and in the management and control of said car and if the defendant has not so shown, the verdict should be for the plaintiff. For the reasons already given, we think there was no error in this instruction, but that it announces a well-settled principle of law, and the duty due from a common carrier of passengers to a passenger on its cars.

3. It is next insisted that the court erred in refusing to give instructions 1 and 2 requested by the defendant. To properly understand this assignment, it should be noted that the court at the request of the defendant gave the following instructions: Third. "If the jury find from the evidence that defendant's car was caused to leave the track by a brick and to collide with the pole, thereby causing plaintiff to be shocked and injured, and if you further find from the evidence that the boy suddenly ran from or near the sidewalk with said brick and placed the same on the track, so near to defendant's car that it was impossible for defendant's motorman with the means and appliances then at his command to stop the car in time to avoid the derailment

of said car, then plaintiff cannot recover, and your verdict will be for the defendant." Fifth. "You are instructed that there is no evidence in this case that the defendant's car or its appliances were unsafe, nor is there any evidence in this case that the rails of the defendant's track were defective, and the court instructs you that you cannot find in favor of the plaintiff and against defendant upon the ground that the car or its appliances were unsafe or the rails of the track were defective." The defendant also asked the following instruction: Fourth: "If the jury find from the evidence that defendant's car was caused to leave the track by the brick mentioned in the evidence, then plaintiff cannot recover in this action, unless you further find from the evidence that said motorman either saw said brick being placed on the track or saw it after it was placed thereon for a sufficient length of time to permit him with the means and appliances at his command to stop the car in time to avoid collision with it." The court declined to give it in this form, but amended it so that it read as follows: "If the jury find from the evidence that defendant's car was caused to leave the track by the brick mentioned in the evidence, then plaintiff cannot recover in this action, unless you further find from the evidence that said motorman either saw or by the exercise of reasonable diligence could have seen said brick being placed on the track, or saw or by the exercise of reasonable diligence could have seen it after it was placed thereon for a sufficient length of time to permit him, with the means and appliances at his command, to stop the car in time to avoid collision with it." The instruction No. 1, refused by the court and asked by the defendant, instructed the jury that, while it was the duty of defendant's motorman to exercise that degree of care that a very careful motorman would be expected to use under the same or similar circumstances to avoid injury to plaintiff and other passengers, it was also his duty to keep a vigilant watch for persons upon or approaching defendant's track, especially children, and if they find from the evidence that, immediately before the accident complained of, children were running and playing upon or near defendant's track so as to be in danger of being struck by defendant's car, and defendant's motorman, seeing said children, was putting his car under control and sounding the gong in order to give the children warning of his approach, and while so engaged and employed failed to see the brick on said track, or its being placed thereon, and that he did not know that a brick had been placed upon the track until after the derailment of the car, and that thereafter he did all that he was able with his appliances to stop the car, then plaintiff could not recover. And the second instruction was along the same line, to wit, that it was the duty of the motorman to sound the bell or gong on his car and to keep the same under control as would enable him to avoid injury to children, and that he had seen the

children, and was in the performance of his said duties, and did not expect or anticipate that an obstacle would be placed upon the track, and, while he was so engaged, a small boy ran suddenly from the sidewalk to the track and placed the brick upon the same, and the motorman did not see the brick or know of its being on the track until after the derailment of the car, and thereafter he used all the means and appliances at his command to stop the car, then plaintiff could not recover. We think the court committed no error in refusing these two instructions. The instructions given by the court for the plaintiff and the defendant fully covered all the issues in the case, and the vigilant watch ordinance in no manner affected it. The instructions amounted to no more than an argument why the motorman did not see the boy place the brick upon the track, and there was nothing in his duty under that ordinance which exonerated him from his duty to keep his eye upon the track, and see if there were any obstructions thereon. Besides all these matters were in evidence and under the instructions given by the court, it was for the jury to determine whether the motorman by the exercise of reasonable diligence could have seen the brick placed on the track, or have seen it after it was placed thereon for a sufficient length of time to permit him with the means and appliances at his command to stop the car. The instructions given fully covered the case, and it was not error to give others which were caluculated to excuse a nonperformance of his duty to his passengers.

4. Finally, it is insisted that the verdict of the jury is grossly excessive. As to this, the evidence for the plaintiff tended to prove that she was a married woman 35 years of age. At the time of her injury she was in perfect health and strength, had never had any occasion to have a family physician. The evidence tended to prove that by the shock of the collision she was violently thrown from her seat in the car against the seats and timbers of the car, striking upon her abdomen and right chest, and was rendered unconscious for a few minutes; that she was three months advanced in pregnancy; that she went immediately home after her injury, and sent for a doctor, and had a miscarriage the evening after the injury; that she was confined to her bed for six weeks; that since she has been able to be up out of bed her health has been poor, and she has been unable to do anything, and has suffered great pain. Her physician, a graduated physician and surgeon, who had practiced his profession 11 or 12 years, testified that she had had a miscarriage, and that he curetted the womb, and that he had continued to treat her up to the time of the trial, that her trouble requires continued treatment, and that she could never get entirely well without an operation, which would necessarily be a dangerous one. On the other hand, the defendant produced the testimony of two expert wit-

nesses, who examined the plaintiff under the order of the court, and testified that she did not have a retroverted womb. The jury heard the evidence of these physicians on both sides, as also the testimony of the plaintiff herself, and made their estimate of her damages. Under our Constitution and laws it was the duty of the jury to determine this question, and, unless their verdict is such that this court can say that it smacks of bias or prejudice, or that it is so unreasonable that it ought not to stand, in view of all the evidence, we would not be justified in interfering with it and substituting our judgment for that of the triors of the fact. That the plaintiff has suffered a serious injury and been compelled to undergo much pain and suffering we think is incontrovertible. This verdict received the approval of the judge who presided on the trial, and in our opinion we would not be justified in declaring it excessive.

The judgment of the circuit court should be, and is, affirmed.

FOX, P. J., and BURGESS, J., concur.

LOUISVILLE & N. RY. CO. *v.* WARFIELD & LEE.

(Supreme Court of Georgia, Nov. 13, 1907.)

[59 S. E. Rep. 234.]

Carriers—Carriage of Goods—Actions for Injury—Allegation of Specific Acts of Negligence—Necessity.*—In an action instituted by a shipper of goods against a common carrier on account of the civil wrong occasioned to the shipper by reason of the fact that the carrier, having received the shipment in good order, did not transport it safely, but delivered it to the shipper, who was also the consignee, in a damaged condition, particular acts of negligence need not be alleged.

Same—Nature of Liability.†—When a carrier fails to deliver the goods intrusted to his care, or delivers them in a damaged condition, no excuse avails him, unless it was occasioned by the act of God, the public enemy, an inherent vice or natural deterioration of the object carried, or, in case of live stock, the viciousness of the

*For the authorities in this series on the subject of pleading negligence, see foot-notes appended to Jacksonville Elec. Co. *v.* Schmetzer (Fla.), 23 R. R. R. 602, 46 Am. & Eng. R. Cas., N. S., 602; Kicht *v.* Wrightsville & T. R. Co. (Ga.), 23 R. R. R. 605, 46 Am. & Eng. R. Cas., N. S., 605; Pittsburgh, etc., Ry. Co. *v.* Nicholas (Ind.), 24 R. R. R. 230, 47 Am. & Eng. R. Cas., N. S., 230.

†See extensive note appended to Chesapeake & O. Ry. Co. *v.* Beasley, Couch & Co. (Va.), 23 R. R. R. 168, 46 Am. & Eng. R. Cas., N. S., 168; Carpenter *v.* Baltimore & O. R. Co. (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679.

animals, or that he is excused by special contract made with the shipper, by statute, or by negligence of the shipper.

(a) In an action against a carrier for the breach of duty to safely transport, specific allegations of negligence may be treated as surplusage.

Same.—The petition, as described in the third query of the Court of Appeals, was not open to the special demurrer made thereto.

Same.—So much of the case of Louisville & Nashville Ry. Co. *v.* Cody, 119 Ga. 371, 46 S. E. 429, as holds that it is necessary for a plaintiff, who elects to bring an action ex delicto against a railroad company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to specifically allege, when called upon to do so by special demurrer, the particular facts upon which he relies in support of his contention that the carrier was negligent touching the transportation of live stock intrusted to its care for shipment, is formally overruled.

(Syllabus by the Court.)

Certified questions from Court of Appeals.

Action by Warfield & Lee against the Louisville & Nashville Railway Company for damage to goods in transit. Judgment for plaintiffs, and defendant brings error to the Court of Appeals, which certifies questions to the Supreme Court.

"The Court of Appeals desires the instruction of the Supreme Court as to the following questions of law for the proper decision of the above-stated case, to wit:

"(1) In a case where an action is instituted by the shipper of goods against a common carrier, on account of the civil wrong occasioned to the shipper by reason of the fact that the carrier, having received the shipment in good order, did not transport it safely, but delivered it to the shipper, who was also the consignee, in a damaged condition, is negligence of the carrier a necessary allegation?

"(2) In such a case, is proof of negligence by the plaintiff material or immaterial? And would it be any defense to the carrier to show that it had not been negligent in respect to the shipment? Or does the defendant's liability turn solely upon its ability to show that the damage resulted by act of God, the public enemy, or similar cause? In construing a petition against the carrier in such a case, may an allegation of the carrier's negligence (either general or specific), through which the carrier caused or allowed the damage to occur, and from which the civil wrong involved in the fact that the carrier did not transport the shipment safely (as it was under legal duty to do) arose, be treated as immaterial or rejected as surplusage?

"(3) In such a case, where the plaintiff in his petition alleges the fact of the delivery of the goods to the carrier under such circumstances as to raise the legal duty on the carrier's part

to safely transport them, and as to raise the liability on the carrier's part for all damages to them save only such as may be occasioned by act of God or the public enemy; and further alleges a breach of this duty, in that the shipper did not safely transport the goods, but caused or allowed them to receive certain definitely described injuries; and, further, in addition to these allegations, alleges that the injuries to the shipment were caused by the negligent delay of the carrier (the nature of the delay having been specifically set forth) and by the carrier's negligence in failing to properly attend to the shipment (the same consisting of live stock) while the same was in its possession—is a special demurrer by the defendant, on the grounds that the acts of negligence charged against the defendant are not described, that it does not show wherein the defendant failed to properly attend the shipment, or what would have been proper attention thereto by the defendant, properly overruled by the trial court?

"In connection with the last question above stated, counsel for the defendant in error in the case at bar has, in accordance with the rules of this court, expressed a desire to question for the purpose of review the decisions of the Supreme Court in the case of Louisville & Nashville R. Co. *v.* Cody, reported in 119 Ga. 371, 46 S. E. 429; and this court, upon a consideration of the question, being of the opinion that the decision should be modified or overruled, in accordance with the rule of court for such cases made and provided, certifies the question together with said request to the Supreme Court."

Hardeman & Jones, for plaintiff in error.
Jos. H. Hall and *Warren Roberts,* for defendant in error.

EVANS, P. J. The questions propounded by the Court of Appeals involve matters of pleading and practice which were considered by this court in the case of L. & N. R. Co. *v.* Cody, in 119 Ga. 371, 46 S. E. 429. If the ruling in that case be adhered to, we could on its authority give categorical answers. But a motion was made in the Court of Appeals to examine and review that case as bearing on the pleading and practice questions submitted to us, and we are requested by the Court of Appeals to review so much of that decision as relates to the matters certified to us for instruction. In the case of L. & N. R. Co. *v.* Cody it was held that it is necessary for a plaintiff, who elects to bring an action *ex delicto* against a railroad company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to specifically allege, when called upon to do so by special demurrer, the particular facts upon which he relies in support of his contention that the carrier was negligent touching the transportation of live stock intrusted to its care for shipment. Is the principle there stated a correct rule of pleading?

At common law a common carrier was bound to convey the goods of any person offering to pay his hire, unless the carriage be already full, or the risks sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying. A common carrier was an insurer of the goods intrusted to his care, and was responsible for every injury sustained by them occasioned by any means whatever, except only the act of God and the King's enemies. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393. For the failure to safely transport and deliver goods an action might be brought against a carrier, either in assumpsit or in case. In assumpsit, the action was for the breach of the contract to carry, and an allegation of the failure to perform was considered a sufficient averment of its breach. When the action was brought in case, it was founded on the breach of the public duty. The duty to receive and safely transport goods was originally implied from the custom of the realm. In the evolution of time, it became incorporated in the common law of England, and an action *ex delicto* for the breach of duty implied by law was very generally pursued to recover damages for goods lost or damaged while in the possession of the carrier. The main difference between the form of pleading in assumpsit and case was that in the former the liability was based upon a breach of contract, while in the latter it was for a breach of duty. In the forms of pleading approved by Mr. Chitty (2 Chit. Pl. [11 Am. Ed.] *pp. 356 and 652) the allegations of breach of contract and breach of duty were substantially in the same words, and were to the effect that the carrier so negligently conducted himself that through his carelessness the goods intrusted to his care became lost to the plaintiff. In Morse *v.* Slue, Sir T. Ryam. 220, 5 Eng. Rul. Cas. 244, one of the oldest cases where the doctrine was stated that a common carrier was responsible for the safe carriage of goods at all events, except for loss occasioned by the act of God or the public enemy, the declaration, which was in case, alleged that 'the carrier so negligently kept the goods that in default of sufficient care the same were totally lost." In Goggs *v.* Bernard, Lord Raymond, 909, 1 Smith. Lead. Cas. (9th Ed.) 354, the action was on the case, against a gratuitous bailee for goods lost in carriage by the neglect of the bailee, and the negligence of the mandatary was alleged in general terms. In declaring against a mandatary, Mr. Hutchinson says the plaintiff need not allege the particular character or degree of negligence upon which he relies for his recovery, but the allegation of negligence generally is sufficient. 1 Hutchinson, Car. § 34. There seems to be no doubt that at common law, in an action *ex delicto*, the plaintiff was not required to allege more than general negligence.

The common-law rule as to alleging negligence generally is in force in many of the states. Lachner *v.* Express Co., 72 Mo.

App. 13; Carlisle *v.* Keokuk, etc., Co., 82 Mo. 40; McFadden *v.* Mo. Pac. Ry., 92 Mo. 343, 4 S. W. 689, 1 Am. St Rep. 721; McCauley *v.* Davidson, 10 Minn. 418 (Gil. 335); Great Western Ry. *v.* Hawkins, 18 Mich. 427; Peck *v.* Weeks, 34 Conn. 145; Lang *v.* Brady, 73 Conn. 707, 49 Atl. 199. The complaint in the last-named case alleged that the defendant is a common carrier; that the plaintiff delivered to him, as such common carrier, certain specified goods, to be carried from A. to B., and there delivered to the plaintiff for hire; that the defendant neglected his duty, in that he did not safely carry and deliver the goods; and that the different articles carried were injured by default of the defendant, to the damage of the plaintiff. The defendant demurred to this complaint because it alleged the several articles specified were injured by default of the defendant, without stating any fact to show in what his default consisted. The court held that, as the action was for a breach of the duty imposed on common carriers, independently of contract, it was not necessary to allege particular acts of negligence.

There is no statute in this state which requires a plaintiff, in a suit against a common carrier for breach of duty in failing to safely transport goods, to allege particular acts of negligence. There are sound reasons why he should not be required to specify the particular acts of the carrier's negligence which caused the loss or injury to his goods. Where the law imposes an absolute duty, the failure to perform that duty to the damage of another raises a liability, and it would be superfluous to inquire into the causes that interfered with the discharge of the duty, when such causes would not relieve from liability. It is an elementary rule of pleading that the allegation of any fact which is not issuable or jurisdictional is not demanded. When the carrier fails to deliver the goods intrusted to his care, no excuse avails him, unless it was occasioned by the act of God or the public enemies of the state. Civ. Code 1895, § 2264. This was the common-law liability. The carrier may also set up as an excuse for the loss or injury of goods in his care, in case of live stock, the viciousness of the animals (Ga. R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81); in the case of perishable articles, the natural deterioration of the object carried (Forrester *v.* Ga. R. Co., 92 Ga. 699, 19 S. E. 811), or the inherent vice in the goods, or that he is excused by the special contract made with the shipper (Boaz *v.* Central R. Co., 87 Ga. 463, 13 S. E. 711), or by statute, or negligence of the shipper. None of these excuses which the law recognizes relate to the degree of care which he must exercise in the performance of his public duty. To illustrate: Suppose the goods are destroyed by a collision of the cars of the carrier. It would be altogether idle to inquire whether the collision was caused by the carrier's negligence, for be he ever so diligent, his diligence would not relieve him from liability, unless he further

shows that the loss of the goods is attributable to one of the causes which the law allows as an excuse for nonperformance of his public duty. To require a specific allegation of negligence relating to the circumstances attending the collision would be to introduce in the pleadings a feigned and superfluous issue. Besides, the shipper has no means of knowing the facts relating to the loss of his goods, and it would be hard on him to demand an averment of facts, concerning which, from the very nature of the transaction, he must ordinarily be ignorant.

The rule stated in L. & N. R. Co. *v.* Cody is a departure from the common law, and it is based upon the four cited cases, none of which was a suit against a carrier for damages arising from the loss or injury of goods delivered to it for transportation. These cases concerned suits where damages were claimed for personal injuries because of the negligence of the carrier. We do not think the two classes of cases are analogous. The duty of a carrier of passengers to safely transport is not absolute. The carrier is bound to use extraordinary diligence to protect the lives and persons of his passengers, but he is not liable for injuries to the person after having used such diligence. Civ. Code 1895, § 2266. So, also, in the case of injuries to employees, and to third persons, the duty is to exercise ordinary care, and when the carrier measures up to his duty he is absolved of liability. Where damages are claimed of a carrier from a failure to exercise the diligence which the law enjoins, the lack of diligence of the carrier is the fundamental ground of the complaint. The authorities cited in the opinion of Mr. Justice Turner only go to the point that, when the gravamen of the complaint is that the injury was caused by the failure of the carrier to exercise proper diligence, the carrier's dereliction in that respect should be sufficiently set forth as to put him on notice of the facts relied on to establish his negligence, in order that he may repel the charge against him. But, where the action is against the carrier for a failure to perform his public duty respecting the transportation of freight, the gravamen of the complaint is the failure to perform such duty, and an allegation that he negligently failed to safely carry the goods, but delivered them in a damaged condition, sufficiently states the breach of duty.

Accordingly, we think that the decision in the Cody Case should be overruled, in so far as it militates with the views herein expressed. We have incorporated in the syllabi answers to the matters about which the Court of Appeals desired instruction. All the Justices concur.

TRUSTEES OF CINCINNATI SOUTHERN RY. CO. *et al. v.* SLAUGHTER *et al.*

(Court of Appeals of Kentucky, Sept. 26, 1907.)

[104 S. W. Rep. 291.]

Easements—Ways—Acquisition—Prescription—Evidence—Admissibility.—Where a party asserts a right by prescription to a way, and shows a continuous user thereof for more than 20 years, evidence of user by others living in the neighborhood for a time insufficient to ripen into a prescriptive right as to them is admissible to show that the community regarded the way as free, if not dedicated, to the use of persons to whom it furnished the only way of reaching a public way.

Same—Evidence—Findings.—A finding that a party had acquired by prescription a right of way over the land of another held justified under the facts.

Same—Presumptions—Burden of Proof.—Where a user of a right of way creates the presumption of a grant, a party assailing the right has the burden of proving that the use of the way was merely permissive.

Railroads—Right of Way—Rights Acquired—Notice of Rights of User.—A railway company acquiring for a right of way land over which individuals exercised and claimed a right of way adverse to and by recognition of the owner is chargeable with notice of the rights of the individuals.

Easements — Ways — Acquisition — Prescription — Deviation from Way.—Where no material changes were made in the location of a right of way claimed by adverse user, and the changes made were not made for the purpose of abandoning the way, they were immaterial on the issue of acquisition of a right of way by adverse user.

Same—Right of Way—Rights Acquired.*—A railway company acquired land for a right of way at a time when individuals exercised and claimed adversely a right of way over the same. The railway right of way was 100 feet in width, and the use by the individuals of their right of way did not interfere with the operation of the railway. The individuals used their right of way for more than 20 years under a claim of right adversely to the company and its grantor. Held, that the individuals acquired by prescription a right of way as against the company.

*For the authorities in this series on the question whether title can be acquired against a railroad company by adverse possession, see foot-notes appended to Louisville & N. R. Co. *v.* Smith (Ky.), 23 R. R. R. 351, 46 Am. & Eng. R. Cas., N. S., 351; Railroad Co. *v.* Village of Roseville (Ohio), 25 R. R. R. 173, 48 Am. & Eng. R. Cas., N. S., 173.

Appeal from Circuit Court, Lincoln County.
"To be officially reported."

Action by the trustees of the Cincinnati Southern Railway Company and another against A. Slaughter and others. From a judgment of dismissal, plaintiffs appeal. Affirmed.

John Galvin and *J. W. Alcorn,* for appellants.
Robt. Harding, M. C. Saufley, Emmett Purycar, and *Greene & Van Winkle,* for appellees.

SETTLE, J. We gather from the record in this case that the village of Moreland, which is situated in Lincoln county and upon the line of railroad owned and operated by appellants, has for its principal thoroughfare the Danville & Hustonville Turnpike Road, and that the railroad runs through its corporate limits nearly north and south, crossing the turnpike a considerable distance north of the town and again somewhat south thereof, after running through the town and almost parallel with the turnpike, between 200 and 300 feet distant therefrom. It further appears that the principal business section of the town is situated on the east side of the railroad, and that appellees, with divers other residents, constitute a considerable settlement on the west side of the railroad. The action was brought mainly to quiet appellants' title to a part of its right of way included in a passway claimed by appellees, and to enjoin appellees from using the passway, which runs from their places of residence, respectively, through a part of appellants' right of way to the Carter Road, which latter road crosses the railroad. The answer of appellees admits their use of the passway and assert their right to it by grant and prescription; it being alleged that they and their vendors have, under claim of right, had more than 15 years continuous possession and use thereof adversely to appellants and all others. The court below, upon the hearing, entered judgment declaring appellees entitled to the passway and dismissing the action, and from that judgment this appeal is prosecuted.

By consent of parties the case was tried upon oral testimony. Owing to the absence from the record of a map, we have had some difficulty in ascertaining the precise location of the passway and places of residence of appellees. While the evidence is conflicting, we are unable to say that the judgment is not sustained by its weight. In other words, considered as a whole, the evidence conduces to show that appellees and those from whom they derived title to their lands had for more than 20 years before the institution of the action, and commencing before appellants acquired their right of way, continuously claimed, occupied, and used the passway; that such user was not permissive, but exercised and enjoyed as a matter of right adversely to appellants and their vendors. One witness testified to a parol grant of the passway by the original owner of the land of which ap-

pellants' right of way is a part. It was also made to appear that several persons, who in recent years have become residents upon and along what is known as "Haly Lane," use, and, like appellees, are dependent upon, this passway as their only route of travel from their homes to the business part of Moreland, the post office, school, and church, east of appellants' railroad track. While the use of the passway by some of the residents on Haly Lane cannot be said to have continued a sufficient length of time to ripen into a prescriptive right as to them, considered in connection with the previous long use of the passway by appellees and vendors under a claim of right, it is a circumstance tending to show that the entire community regarded the passway as free, if not actually dedicated, to the use of persons to whom it furnished the only way of reaching the Carter crossing.

Accepting the correctness of the chancellor's conclusions of fact, we must conclude that such user of a right of way as appellees and their vendors seem to have enjoyed creates the presumption of a grant. This being true, the burden was on appellants to rebut this presumption by proving that the use of the passway by appellees and their vendors was merely permissive. O'Daniel *v.* O'Daniels, 88 Ky. 185, 10 S. W. 638; Bowen *v.* Cooper, 23 Ky. Law Rep. 2065, 66 S. W. 601; Anderson *v.* Southworth, 25 Ky. Law Rep. 776, 76 S. W. 391; Chenault *v.* Gravitt, 27 Ky. Law Rep. 403, 85 S. W. 184; Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 88; Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 642; Commonwealth *v.* Terry, 27 Ky. Law Rep. 694, 86 S. W. 519; Ray *v.* Nally, 28 Ky. Law Rep. 421, 89 S. W. 486.

As a railroad company, in the performance of its duties as a common carrier, may require the use of its entire right of way (which, after all, is but an easement), for the laying of additional tracks or other purposes appertaining to its business, we would hesitate to say that it should be compelled to yield a passway over its right of way, upon the grounds of prescriptive right or presumed grant asserted by the claimant, however long continued the adverse user, if such user had its beginning after the railroad company acquired its right of way. But no such state of cases is here presented, for appellants' right of way is 100 feet in width, and it was neither alleged in the petition, or shown by proof, that appellees' use of the passway will prevent the construction of additional tracks at that point, or otherwise interfere with the operation of the railroad. Besides, according to the weight of the evidence, the use of the passway in question by appellees or their vendors appears to have commenced and was exercised and claimed as a right adversely to, and by recognition of the then owners of the land, appellants' vendors, before appellants acquired their right of way, which use on the part of appellees or

their vendors continued without interruption until the time of the institution of this action. Appellants, in acquiring their right of way, were therefore charged with notice of appellees' right to the passway, for, as said in Wright *v.* Willis, 23 Ky. Law Rep. 565, 63 S. W. 991, quoted with approval in Ray *v.* Nally, 28 Ky. Law Rep. 421, 89 S. W. 486: "The purchaser of land through which an old road passed was charged with notice of the fact that the persons using the road claimed the use as a matter of right, as he might have ascertained that fact by inquiring of them, instead of inquiring of the vendor, who informed him that the use was merely permissive."

It appears from the evidence that the passway over appellants' right of way is, and has all along been, a well-defined roadway, showing the use and wear of both vehicles and horses. It is, however, insisted for appellants that more than one change has been made in the passway since its use commenced, and that such changes negative appellees' claim of an adverse use of the passway. We are unable to see the force of this argument. The evidence fails to show any material change in the passway since it was established, or that changes were made with the purpose of abandoning it as a passway. The effect of such changes in a road or passway is commented on in the case of Anderson *v.* Southworth, 25 Ky. Law Rep. 776, 76 S. W. 391, in the opinion of which it is said: "It is true that one or two changes of the passway were made to straighten the fences of some of the owners of the land, or to get it upon firmer and better ground; but such changes were made by moving it only a few feet, and with no purpose of abandoning it as a passway." Ray *v.* Nally, 28 Ky. Law Rep. 421, 89 S. W. 486. The views herein expressed are not in conflict with the opinion in Thompson *v.* Louisville & Nashville Railroad Company, 110 Ky. 973, 63 S. W. 42. The question for decision in that case was whether or not the appellant Thompson was legally entitled to the use of a passway over the right of way of the railroad company. It was held that he was not, because: (1) The railroad company acquired title to and possession of the right of way over which the passway was claimed from the appellant Thompson's ancestors, Sylvester and Mary Thompson, by proper conveyances without any reservation of the passway; (2) these conveyances were made prior to the time the appellant acquired title to his land by inheritance; (3) the testimony relied on by appellant to establish his right to the passway affirmatively showed that no grant was ever made him of the passway, and failed to show such a continued and adverse user thereof by him or those under whom he claimed as could have ripened his claim into a legal right by prescription; (4) the facts presented by the record were such as to make it manifest that the use of such part of the company's right of way, as would have been included in the passway claimed, was ab-

solutely essential to the operation of its railroad. Thornton *v.* Railroad Company, 19 Ky. Law Rep. 96, 39 S. W. 694. The following excerpt from the opinion summarizes the court's conclusions: "To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that its use was accompanied by a claim of right, or by such acts as manifest an intention to enjoy it without regard to the wishes of the railroad company. The record entirely fails to show such evidence in this case, and it is highly improbable that such a grant was ever made, as it is manifest that the entire right of way claimed by appellee will ultimately become absolutely essential to it in running its road, and the business of the country has rapidly developed since the road was projected, and probably in a very short time double or quadruple tracks will be necessary for the transportation of traffic over its line."

The pertinency of the last conclusion expressed in the opinion *supra* will be better understood when it is suggested that it is elsewhere stated in the opinion that the right of way of the Louisville & Nashville Railroad Company is only 66 feet in width. Moreover, it appears that the railroad company made in that case the defense that the granting of the passway asked over its right of way would not leave it at that point a sufficiency of ground for the proper operation of its railroad. As before indicated, no such defense was or could have been made in the case at bar. The facts appearing in the record would have given it no support. In other respects the case *supra* is quite unlike this, for here there is evidence out of which arises the presumption of a grant of the right of appellees to the passway, as their use of it has been attended by circumstances which make it appear that such use was accomplished by a claim of right, and also by acts sufficient to manifest an intention on their part to enjoy it without regard to the wishes of appellants.

Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. *v.* EICHBURG *et al.*

(Court of Appeals of Maryland, Feb. 5, 1908.)

[68 Atl. Rep. 690.]

Corporations—Foreign Corporations—Carrying on Business Within State.—Contracts were made in Maryland, through the Merchants' & Miners' Transportation Company, a domestic corporation, for the Central of Georgia Railway Company, a foreign corporation, which the foreign company recognized as binding. The domestic corporation sold tickets and issued bills of lading good over its own line and also over the lines of the foreign corporation, collecting the whole fare in the case of a passenger, and collecting the entire charge for the carriage in the case of freight. An agent within the state was appointed jointly by the two companies to solicit traffic over both lines, which were advertised under the name of the "Central Savannah Line." In the window of the building occupied by the domestic company there was a sign "Central Savannah Line via Central of Georgia Railway & Merchants' and Miners' Transportation Company." In this building the joint agent had his office, and solicited freight for transportation over parts of the entire line. The advertising folders of the Central of Georgia Railway stated that tickets over that line could be purchased at any of the Merchants' & Miners' ticket offices. Held, that the Central of Georgia Railway Company was transacting business in Maryland within the meaning of Code Pub. Gen. Laws 1904, art. 23, § 409, providing that any corporation not chartered by the state which shall transact business therein shall be deemed to hold and exercise its franchises within the state, and shall be liable to suit in any of the courts of the state on any dealings or transactions therein.

Same—Actions—Process—Service—Sufficiency.*—In the absence of statutory provision, process in an action against a corporation is sufficient, if served upon some person upon whom it may fairly be presumed the duty devolves by virtue of his official position, or of his employment to communicate the fact of service to the governing power of the corporation, and service on such person is service on the corporation.

Same.*—Where process is served upon the agent of a foreign

*For the authorities in this series on the questions, where actions against railroads may be brought, and upon whom, in such actions, summons may be served, see foot-notes appended to Coakley *v.* Southern Ry. Co. (Ga.), 13 R. R. R. 371, 36 Am. & Eng. R. Cas., N. S., 371, where all those preceding it are collected; foot-notes appended to Peterson *v.* Chicago, etc., R. Co. (U. S.), 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247; Green *v.* Chicago, etc., Ry. Co. (U. S.), 25 R. R. R. 194, 48 Am. & Eng. R. Cas., N. S., 194; Nelson *v.* Chicago, etc., R. Co. (Ill.), 23 R. R. R. 668, 46 Am. & Eng. R. Cas., N. S., 668.

corporation, the service must be upon such an agent as represents the corporation with respect to the business which it does within the state.

Same.—Where a foreign corporation avails itself of the privileges of doing business within a state whose laws authorize it to be sued there by service of process upon an agent, its assent to the mode of service is implied so as to render it amenable to suit by the mode of service prescribed by the statute.

Same.*—Two connecting carriers, one a foreign and the other a domestic corporation, employed the same agent in the state to solicit business. His office was maintained jointly by both companies in a building in which was located the offices of the domestic corporation. He was under the immediate direction of the domestic corporation by whom his salary was paid in the first instance, though a portion of such salary was afterwards collected from the foreign corporation. He did not issue bills of lading, but quoted rates, and directed shippers to the offices of the domestic corporation where bills of lading were issued, and the whole charge for transportation over both lines collected. Held, that under Code Pub. Gen. Laws 1904, art. 23, § 411, authorizing service upon any agent of a foreign corporation holding and exercising franchises within the state, service upon the soliciting agent of the process against the foreign corporation was sufficient to render it amenable to an action in personam within the state.

Appeal from Superior Court of Baltimore City.

Action by Maurice H. Eichberg and another, copartners, trading as the Paper Mills Company, against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

John J. Donaldson, for appellant.
William S. Bryan, Jr., for appellee.

WORTHINGTON, J. The action in this case was instituted in the superior court of Baltimore city by the appellees (plaintiffs below) against the appellant and the Merchants' & Miners' Transportation Company, as joint defendants, to recover damages alleged to have been sustained by the plaintiffs through the negligence of the defendants in transporting a large quantity of wrapping papers and paper bags from Atlanta, in the state of Georgia, to Baltimore, in the state of Maryland; the wrapping paper and paper bags having been as alleged injured in transit. The narr avers that both the defendants are common carriers of goods; the Central of Georgia Railway Company operating a

*See foot-note on preceding page.

steam railroad from Atlanta, in the state of Georgia, to Savannah, in the state of Georgia, and the Merchants' & Miners' Transportation Company operating steamships from Savannah, in the state of Georgia to Baltimore, in the state of Maryland. Upon the filing of the narr, a summons was issued out of said court for the defendants, upon which the sheriff made the following return: "Summoned the Merchants' & Miners' Transportation Company, a body corporate, by service on John H. Robinette, treasurer, and the Central of Georgia Railway Company, by service on Frank L. Mortimer, its commercial agent, and a copy of narr, and notice to plead left with each defendant; also notice of said summons left at the principal offices of the said corporations; also copies of the writ of summons, the process in the within case, under cover, with postage stamp annexed to each envelope, placed in the post office of Baltimore city on the 21st day of March, 1907, and directed to John H. Robinette and Frank L. Mortimer, respectively, at the principal offices of said companies at the southeast corner of Light and German streets in the city of Baltimore, they being the officers in charge thereof." Subsequently the Central of Georgia Railway Company appeared by counsel, specially and not generally, and moved the court to quash the writ of summons issued against it, and to set aside the alleged service of the same, for the reasons (1) that the said railway company was incorporated by the state of Georgia, where its lines were chiefly located, and that it did not transact business in the state of Maryland so as to be amenable to the jurisdiction of the courts of this state, and (2) that service was not made on such an agent of said corporation as would legally bring the corporation into court. The court below held the service sufficient, and the railway company has brought this appeal.

It was agreed by counsel at the argument that no advantage should be taken of the fact that there has been no final disposition of the case by the court below, the desire on both sides being to have the question of the sufficiency of the service determined by this court on this appeal. In regard to the service of summons on foreign corporations the statute law of this state provides as follows:

"(409) Any corporation not chartered by the laws of this state which shall transact business therein shall be deemed to hold and exercise franchises within this state and shall be liable to suit in any of the courts of this state on any dealings or transactions therein."

"(411) Suits may be brought in any court of this state, * * * against any corporation not incorporated under its laws, but deemed to hold and exercise franchises herein, * * * by a resident of this state for any cause of action; and process in such suits may be served as provided in section 410, and also

upon any agent of such corporation, * * * and in case of service of process on any agent notice of such process shall be left at the principal office of said corporation if there be such office in this state." Code Pub. Gen. Laws 1904, art. 23, §§ 409-411.

The question is one for judicial determination upon the facts as they appear in the record. The question may be divided into two propositions: First. Was the appellant doing business in this state? Second. Was the service upon a proper agent of the appellant? The facts as they appear in the affidavits and testimony found in the record are as follows: The appellant is a railroad corporation, organized and existing under the laws of the state of Georgia, having its whole railroad and traffic in that state and in adjoining states, no portion of its line of railway extending into this state. It does, however, have an agent in this state, a Mr. Mortimer, whose duty is to solicit in Baltimore and the surrounding territory, traffic for and over what is called the "Central Savannah Line"; the Central Savannah Line having no distinct legal entity, but being merely a name to indicate the route made up of the Merchants' & Miners' Transportation Company, the Central of Georgia Railway Company, and the connections of the said railway company. Mr. Mortimer has an office in Baltimore, the expense of maintaining which is paid jointly by the companies above named. He has no authority as the employee of the Central of Georgia Railway Company to make contracts or agreements for the shipment of goods or passengers or to sign any bills of lading for freight. All bills of lading for goods received by the Merchants' & Miners' Transportation Company for shipment to Savannah, Ga., and from thence to points on the appellant's line, are issued by the said Merchants' & Miners' Transportation Company. All other bills of lading issued in Maryland entitling the holder thereof to the transportation of property over the appellant's line in Georgia are issued by the initial carrier, and not by the appellant. Mr. Mortimer in the solicitation of business is under the direction of the Merchants' & Miners' Transportation Company. He has no discretion in the quoting of rates, and no authority to make or agree to rates other than those printed in the tariff issued to the public for account of the appellant railway company by the Merchants' & Miners' Transportation Company. He has no authority to collect any moneys in payment of freight, or to entertain or pay claims for loss or upon any other ground. Mr. Mortimer's salary is paid to him directly by the Merchants' & Miners' Transportation Company, who in turn collects from the appellant its proportionate part. The appellant has no property in the state of Maryland except its interest in the furniture and fixtures used by Mr. Mortimer in his office. Mr. Mortimer's whole duty is to solicit freight, to seek to get it against the appellant's competitors, and to persuade the shippers to select the

route which includes the Central of Georgia. In case of goods going South over the Central Savannah Line via the Merchants' & Miners' Transportation Company, the latter would issue the bill of lading. The bill of lading in the record reads in part as follows: "This bill of lading is signed for the different carriers who may engage in the transportation, severally not jointly, each of which is to be bound by and have the benefit of the provisions thereof, and in accepting this bill of lading the shipper, owner, and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations whether printed or written." A ticket sold by the Merchants' & Miners' Transportation Company over its line to Savannah and thence by the appellant's road to Macon, Ga., reads in part as follows: "In selling this ticket for passage over other lines and checking baggage on it the Merchants' & Miners' Transportation Company acts only as agent, and is not responsible beyond its own line." One of the coupons on the ticket reads as follows: "Transfer.—Transfer of one passenger and ordinary baggage from the Merchants' & Miners' Transportation Company's wharf to Central of Georgia Railway depot." Then follow the names of several cities and towns in Georgia and Alabama presumably stations on the line of appellant's railroad in those states, and then appear the words, "Issued by Merchants' & Miners' Transportation Company." On cross-examination Mortimer stated "that his office is in the Merchants' & Miners' office building at the corner of Light and German streets, and that on the window of his office are the words 'Central of Georgia Railway, Commercial Agent'; that he received his pay from the Merchants' & Miners' Transportation Company, but presumed it is contributed to by the Atlantic Coast Line and the Central of Georgia Railway Company. If one wanted to send freight from here (Baltimore) to some point on the Central of Georgia Railway, witness would quote him a rate. Witness would not take the money and issue a bill of lading. This would be done by the agent of the Merchants' & Miners' Company at Long Dock." It was admitted for the purposes of the motion that the plaintiffs are both residents of the state of Maryland. It was also admitted that through shipments are made from Baltimore by way of the Merchants' & Miners' Transportation line and the Central of Georgia Railway to points on the line of the latter road, and a through bill of lading is issued for the same, and a single sum paid for the carriage; also that there is a sign on the door of the office where a ticket like the one aforementioned was sold, which reads: "Merchants' & Miners' Transportation Company's Ticket Office." On one of the windows in the building is the following sign: "Central Savannah Line via the Central of Georgia Railway and the Merchants' and Miners' Transportation Company." The regular advertising folders have inside of them

the statement that "the Central of Georgia sells tickets over the Merchants' & Miners' Transportation Company for the Jamestown Exposition and the tickets over the Central of Georgia can be purchased at any of the Merchants' & Miners' ticket offices." Plaintiffs proved by the deputy sheriff who served the writ of summons in this case that before serving the writ he first asked Mr. Mortimer if he was the commercial agent of the Central of Georgia Railway Company, and having been answered in the affirmative, he served the writ upon him. It also appears that there is another soliciting agent of the appellant in the office of Mr. Mortimer who is under the control of Mr. Mortimer, and who is called the "Commercial Agent of the Central Savannah Line." Upon these facts depend the answer to the question whether the service of summons on Mortimer was legally sufficient to bring the appellant within the jurisdiction of the superior court where this suit was instituted.

One element of this sufficiency, as heretofore suggested, is whether, at the time of the service of the summons on Mortimer, the appellant was doing or transacting business in this state, and another is whether Mortimer was at the time of such service such an agent of the appellant corporation as is contemplated by our statute regulating service of process upon foreign corporations doing business here. There is no case in our own reports directly decisive of the question, and an examination of the reported cases of the other states and of the federal courts, on the subject discloses some diversity of opinion in regard to it. It was formerly held that a corporation could not be sued in personam outside the boundaries of the state under whose laws it was created, and wherein it resided (19 Cyc. 1323; Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859); but to meet and obviate the inconvenience and injustice of such a doctrine the Legislatures of the several states interposed and provided for the service of process on officers and agents of foreign corporations doing business therein (St. Clair *v.* Cox, 106 U. S. 350, 1 Sup. Ct. 354 [1882] 27 L. Ed. 222). In 19 Cyc. 1326, where this subject is considered, the governing principle in such cases is declared to be set forth in the clearest light by Mr. Justice Field in St. Clair *v.* Cox, *supra*, as follows: "The foreign corporation must have entered the domestic state for the purpose of carrying on its business there: and the process must be served upon an agent sustaining such relation to it that notice to the agent might well be deemed notice to the principal without any violation of the principles of natural justice." In solving the question presented by the record in this case, the first inquiry is whether the appellant was at the time of the service of the summons on Mortimer transacting business in this state within the meaning of our statute. The facts show that while Mortimer, the agent upon whom

the summons was served, had no power to make contracts for the appellant, yet that by and through the agency of the Merchants' & Miners' Transportation Company, a domestic corporation, contracts were made in this state for and in the name of the appellant, which contracts the appellant recognized and accepted as valid and binding upon it. The domestic corporation sold tickets and issued bills of lading good over its own line and also over the lines of the appellant. In the case of a passenger the whole fare would be paid to the domestic corporation, and in the case of frieght a through bill of lading would be issued and a single sum paid for the carriage. Mr Mortimer was appointed jointly by the Merchants' & Miners' Transportation Company and its connecting carrier, the Central of Georgia Railway Company, to solicit traffic for what was known as the "Central Savannah Line," which was the appellation for advertising purposes of the whole route made up principally of the two connecting carriers above mentioned. Thus on one of the windows in the building occupied by the Merchants' & Miners' Transportation Company at the Southeast corner of Light and German streets in the city of Baltimore appears the sign: "Central Savannah Line via Central of Georgia Railway and the Merchants' & Miners' Transportation Company." In this same building Mortimer has his office, and, as the representative of both these connecting carriers, is regularly engaged in the procurement of freight for transportation over some part of the entire line. The regular advertising folders of the appellant have inside of them the statement that tickets over the Central of Georgia can be purchased at any of the Merchants' & Miners' ticket offices. All these facts and circumstances taken together show that the sale of tickets and the issuance of through bills of lading by the domestic corporation over its own line, and over the lines of the appellant, were not occasional or accidental merely, but a part of its regular, usual, and ordinary business, and that the domestic corporation was the recognized agent of the appellant, and, as such, authorized to make contracts in this state for the transportation of passengers and freight over appellant's lines in the state of Georgia. We must therefore hold that the appellant was transacting business in this state within the meaning of our statute provisions on the subject. For cases more or less analogous we cite: Denver & Rio Grande R. R. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Van Dresser *v.* Oregon Ry. Co. (C. C.) 48 Fed. 202; Merchants' Mfg. Co. *v.* Grand Trunk Ry. Co. (C. C.) 13 Fed. 358.

The remaining inquiry is whether Mortimer, upon whom the summons in this case was served, was, at the time of such service, such an agent of the appellant as is contemplated by our statute. While it is true that, when process is served on an agent of a foreign corporation, the service must be upon such an agent

as represents the corporation with respect to business which it does within the state. (Crook *v.* Girard Iron Co., 87 Md. 138, 39 Atl. 94, 67 Am. St. Rep. 325; North. Cent. Ry. Co. *v.* Rider, 45 Md. 24), yet the general principle, apart from statutory provision in regard to all corporations, is that process is sufficient if served upon some person upon whom it may fairly be presumed the duty devolves by virtue of his official position, or of his employment, to communicate the fact of service to the governing power of the corporation. Service on such a person is service on the corporation. Dock *v.* Elizabethtown Steam Mfg. Co., 34 N. J. Law, 312. When a statute of the forum state provides a method of service upon foreign corporations doing business there, the foreign corporation which comes there and transacts business is presumed to assent to such method of service as fully as though it had specially authorized its agents to receive service of process in such method. Boggs *v.* Inter-American, etc., Co. (Md.) 66 Atl. 262; 13 A. & E. Ency. Law, 895; Reeves *v.* Southern Ry. Co., 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 523. In the case at bar Mortimer, upon whom the summons was served, was at the time of such service the acknowledged agent of the appellant in this state for the purpose of solicitation. He was also the agent of the Merchants' & Miners' Transportation Company for the same purpose. In addition to this his office in Baltimore was maintained jointly by the two connecting carriers in the same building where were located the offices of the domestic corporation, which, as we have seen, was, for transportation purposes, the agent of the appellant in this state. He was under the immediate direction of the domestic corporation by whom his salary was, in the first instance, paid, though a proper proportion of such salary was afterwards collected of the appellant. While Mortimer did not himself issue bills of lading, he did quote rates and direct shippers to the offices of the domestic corporation where through bills of lading were issued and the whole charge for transportation collected. Was he not therefore representing the appellant here with respect to the business which it was doing in this state? and may it not fairly be presumed from the character of his employment, without any violation of the principles of natural justice, that he would communicate the fact of the service of summons upon him to the governing power of the foreign corporation which he represented here? If so, we think Mortimer was such an agent of the appellant as is contemplated by our statute. When a corporation avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to that mode of service is implied. Accordingly it has been repeatedly held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for

the transaction of its affairs. Denver, etc., R. Co. v. Roller, 100 Fed. 741, 41 C. C. A. 22, 49 L. R. A. 77; Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451.

We have examined and carefully considered the cases referred to by the learned counsel for the appellant, and consider that wherein they are not distinguishable from the case at bar we cannot give them our sanction as applicable to the interpretation of the statute law of this state regulating service of process in a transitory action like this.

We hold, therefore, that the appellant was doing business within this state, and that the service of process upon Mortimer was upon an agent bearing such relation to the business the appellant transacted in this state as to render appellant amenable to an action in personam in the court wherein this suit was instituted. The judgment will therefore be affirmed, with costs.

Judgment affirmed, with costs.

MASON CITY & FORT DODGE RAILROAD COMPANY v. C. D. BOYNTON.

(Argued January 22, 23, 1907. Decided February 25, 1907.)

[27 Sup. Ct. Rep. 321.]

Removal of Causes—Diverse Citizenship—Which Party Is Defendant in Condemnation Proceedings.*—The express declaration in Iowa Code 1897, § 2009, that, on the appeal to a district court, which either party may take from the commissioners' award in proceedings to condemn land for railway purposes, the "landowner shall be plaintiff and the corporation defendant," does not fix the status of the parties under the removal act, but the landowner must be deemed the defendant so far as the right of removal to a Federal circuit court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit presenting a question as to whether the landowner in condemnation proceedings is the defendant for the purpose of removal to a Federal circuit court. Answered in the affirmative.

*For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see foot-note appended to Staton v. Atlantic Coast Line R. Co. (N. Car.), 23 R. R. R. 678, 46 Am. & Eng. R. Cas., N. S., 678; foot-notes appended to Cincinnati, etc., Ry. Co. v. Bohon (U. S.), 22 R. R. R. 434, 45 Am. & Eng. R. Cas., N. S., 434.

Statement by MR. JUSTICE HOLMES:

This case comes here on the following certificate:

"The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on the 8th day of December, A. D. 1905, certifies that the record on file in the above-entitled cause, which is pending in such court upon a writ of error duly issued to review a judgment rendered in such cause in favor of the defendant in error in the circuit court of the United States for the southern district of Iowa, discloses the following:

"The Code of Iowa, 1897, in a chapter relating to the taking of private property for works of internal improvement, including the construction and repair of railways, contains the following:

" 'Sec. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises.'

" 'Sec. 2009. Either party may appeal from such assessment to the district court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The landowner shall be plaintiff and the corporation defendant.

" 'Sec. 2010. An appeal shall not delay the prosecution of work upon said railway if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof.

" 'Sec. 2011. On the trial of the appeal no judgment shall be rendered except for costs. The amount of damages shall be as-

certained and entered of record, and, if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the landowner, a reasonable attorney's fee, to be taxed by the court.

" 'Sec. 2012. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on or using or controlling the premises. The sheriff, upon being furnished with a certified copy of the assessment, may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him.

" 'Sec. 2013. If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the landowners.'

"Section 3497 of the Code of Iowa, 1897, also provides:

" 'An action may be brought against any railroad corporation, * * * in any county through which such road or line passes or is operated.'

"The Mason City & Fort Dodge Railroad Company, plaintiff in error, hereinafter called 'railroad company,' was a railroad corporation organized and existing under the laws of the state of Iowa, and, as such, entitled to avail itself of the provisions of the foregoing statutes of Iowa. C. D. Boynton, defendant in error, hereinafter called the owner, was the owner of certain lots of ground in the town of Carroll, Carroll county, in the state of Iowa, and was, at all times mentioned herein, a citizen of the state of Missouri. Prior to February 18, 1902, the railroad company, requiring Boynton's lots as a right of way for the construction of its railroad, filed an application in the office of the sheriff of Carrol county, asking for the appointment of six freeholders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use of the railroad company. On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4,750.

"On the same day the railroad company paid the sheriff that amount of money for the use of the owner.

"Afterwards, and within the time fixed by the state statute, the owner appealed from the commissioners' award to the district court of Carroll county. In due time, the owner filed in the last-mentioned court a petition for the removal of the cause into the circuit court of the United States for the western division

of the southern district of Iowa, on the ground of diversity in citizenship. In his petition and bond to secure such removal the owner referred to and treated himself as the defendant, and referred to and treated the railroad company as the plaintiff, in the case.

"In due course the cause came on for hearing in the circuit court, when the parties, by a written stipulation filed with the clerk, waived a jury and agreed to try the case to the court. Both parties introduced evidence and fully submitted themselves to the jurisdiction of the court (if they could do so). The trial resulted in an assessment of the owner's damages at $11,445, and in a judgment against the railroad company for costs, including a fee of $300 for the owner's attorneys. In due time the railroad company regularly sued out a writ of error to the end that the record and proceedings in the circuit court might be reviewed by this court. The assignment of errors which accompanied the petition for the writ of error alleged that the circuit court erred in ascertaining and fixing the amount of damages to be paid by the railroad company for its appropriation of the owner's lots, in that there was an entire absence of evidence to support the award and finding. At no time during the pendency of the proceedings in the circuit court did the railroad company question the jurisdiction of that court or the right of the owner to remove the cause into that court, but both parties participated in the trial up to a final judgment, and in the proceeding to secure a writ of error, as if there was no question of jurisdiction in the case. Not until the railroad company filed its brief in this court was the jurisdiction of the circuit court in any manner challenged. But, in its brief, as also in the oral argument made in its behalf, the chief point relied upon by the railroad company to secure a reversal of the finding and judgment of the circuit court is that the owner was the plaintiff in said cause and proceeding, and did not have the right to remove the same into the circuit court, and that therefore that court could not entertain jurisdiction thereof.

"And the circuit court of appeals for the eighth circuit further certify that the following questions of law are presented in this cause, that their decision is indispensable to a decision of the cause, and that to the end that such court may properly decide the issues of law so presented it desires the instruction of the Supreme Court of the United States upon such questions, to wit:

"1. Was the landowner a defendant within the meaning of the removal statute, when the suit was removed into the circuit court?

"2. If the landowner was not a defendant, within the meaning of the removing statute, could the circuit court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to

the effect that the removal, on the ground of diverse citizenship, may be 'by the defendant or defendants therein, being nonresidents of that state,' restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the circuit court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that noncompliance therewith, or nonconformity thereto, may be waived?

"3. Is the judicial proceeding which the landowner is authorized by the statutes of Iowa to initiate in the district court of the state, by way of a so-called appeal from the assessment of the commissioners selected by the sheriff, a suit which can be originally instituted in the circuit court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

"4. If the circuit court could not have taken cognizance of the suit through the removal by the landowner, and if the circuit court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties, by appearing in the circuit court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, authorize the circuit court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?

Messrs. Thomas D. Healy, A. G. Briggs, John L. Erdall, M. F. Healy, and *Robert Healy* for the Mason City & Fort Dodge Railroad Company.

Mr. Benjamin I. Salinger for Boynton.

MR. JUSTICE HOLMES delivered the opinion of the court:

In Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251, it was decided that proceedings of this character could be removed to the United States circuit court. The question to be decided now is only whether the removal in this case can be upset on the ground that it was asked by the wrong party. The railroad company relies upon the words of the Iowa Code, § 2009, quoted above, and upon a decision of the supreme court of the state in a case like the present, except that the railroad was a foreign company, in which it was held that the railroad had a right to remove. Myers *v.* Chicago & N. W. R. Co., 118 Iowa, 312, 324, 91 N. W. 1076. See also, Kirby *v.* Chicago & N. W. R. Co., 105 Fed. 551. It is said that this court is bound by the construction given to the state law by the state court. Indeed, the above § 2009 does not need construction; it enacts, in terms, that

the landowner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being nonresidents of the state, it is argued that the state decision ends the case.

But this court must construe the act of Congress regarding removal. And it is obvious that the word "defendant" as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which, for the purposes of removal, this court might think the proper ones to be applied. In condemnation proceedings the words "plaintiff" and "defendant" can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary, in order to decide that the present removal was right, to say that the state decision was wrong. We leave the latter question where we find it. But we are of opinion that the removal in this case was right for reasons which it will not take long to state.

It is said the proceedings only become a case, within the meaning of the act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to suppose that the deposit impairs the railroad's right to withdraw, although the supreme court of Iowa says *ubi supra,* that, by payment and entry, the railroad appropriates the land. See § 2013. Probably, too, the position of the parties under the act of Congress should be determined upon general considerations, without regard to what has happened. Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The state is too con-

siderate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. Hudson River R. & Terminal Co. *v.* Day, 54 Fed. 545.

It is not argued that this is any the less a suit because the railroad is free to decline to take the property. The adjudication fixes the right of the railroad to take the land at the price adjudged, and charges it with costs and attorney's fees taxed by the court, in case it elects not to take. The question is not discussed in Madisonville Traction Co. *v.* St. Bernard Min. Co. *supra,* where, if there had been anything in it, possibly it might have been raised. As what we have said is sufficient to dispose of the matter of the certificate, we think it unnecessary to consider other arguments, or to answer any question but the first.

The first question is answered "Yes."

NEW YORK, C. & ST. L. R. CO. *v.* HAMLIN.

(Supreme Court of Indiana, Jan. 8, 1908.)

[83 N. E. Rep. 343.]

Master and Servant—Injuries to Servant—Care Required—Foreign Cars—Inspection.*—Where a railroad company received a foreign car to be handled in a switchyard, it must exercise reasonable care to inspect the car to ascertain if it is in a reasonably safe condition, and if found out of repair, either to repair it, or notify those of its employees who may be called on to handle it of the danger or defect.

Same—Complaint.—In an action for injuries to a switchman, the first paragraph of the complaint alleged that defendant hauled a defective and dangerous car, with a large nail projecting from the brake beam in such a position as to come in contact with the person and clothes of a switchman engaged in coupling that end of the car.

*For the authorities in this series on the subject of the duty of a railroad company, as a master, to inspect foreign cars, see foot-notes appended to New York, etc., R. Co. *v.* Hamlin (Ind.), 22 R. R. R. 701, 45 Am. & Eng. R. Cas., N. S., 701.

For the authorities in this series on the subject of the duty to warn and instruct employees, see foot-notes appended to Louisiana & A. R. Co. *v.* Miles (Ark.), 25 R. R. R. 475, 48 Am. & Eng. R. Cas., N. S., 475; Bollington *v.* Louisville & N. R. Co. (Ky.), 25 R. R. R. 350, 48 Am. & Eng. R. Cas., N. S., 350; foot-notes appended to Savage *v.* Rhode Island Co. (R. I.), 25 R. R. R. 206, 48 Am. & Eng. R. Cas., N. S., 206.

The plaintiff had no knowledge or notice of the defect in time to avoid it, though the defendant might have discovered it on reasonable inspection, by reason whereof defendant failed to furnish plaintiff with a safe place to work and safe appliances, which resulted in plaintiff's injury. The second paragraph alleged, in addition, that immediately on arrival of the car in the defendant's switchyard, prior to the accident, defendant inspected it, and found its defective condition, but failed to repair or give warning thereof, though it had sufficient time to do so. Held, that neither paragraph is demurrable for want of facts.

Trial—Special Interrogatories—General Verdict—Conflict.—Under Prac. Act, § 337, Rev. St. 1876, p. 172, authorizing a rendition of judgment on answers to special interrogatories, if they are in irreconcilable conflict with the general verdict, it must appear from all of such interrogatories taken together that such conflict exists, in order to justify the setting aside of a general verdict.

Same—Presumptions.—Presumptions and intendments arising in support of a general verdict cannot be also indulged to establish a contradiction in the answers to special interrogatories, but, except in cases of doubt, that construction should be adopted which probably sustains the conflict.

Same.—In an action for injuries to a switchman, the jury found that the coupling plaintiff was attempting to make at the time he was injured could not have been safely made, without injury to plaintiff, by his going in advance of the moving car and opening the knuckle on the standing car, because there was insufficient time, and because plaintiff had his back to the moving train. Held, that it appearing that the jury in answering such interrogatories had in mind the nearness of the cars at the moment plaintiff entered upon his attempt to make the coupling, and that it was then too late to stop or slacken the movement of the train and go forward to the standing car, such answer was not in conflict with another answer that plaintiff could not have made the coupling he was attempting to make with safety by going in advance and opening the knuckle on the standing car, and stepping outside the tracks and allowing the cars to come together.

Master and Servant—Injuries to Servant—Contributory Negligence—Proximate Cause.†—Plaintiff, an experienced switchman, with

†For the authorities in this series on the subject of the contributory negligence of employees in attempting to do their work by a more dangerous method than another he might use, see foot-notes appended to Southern Ry. Co. *v.* McGowan (Ala.), 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353.

For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to Missouri, etc., Ry. Co. *v.* Welch (Tex.), 25 R. R. R. 700, 48 Am. & Eng. R. Cas., N. S., 700; Liles *v.* Fosburgh Lumber Co. (N. Car.), 25 R. R. R. 517, 48 Am. & Eng. R. Cas., N. S., 517; Hayes *v.* Southern

full knowledge of the operation of cars in defendant's yard and control of the switch engine with which he was employed, was injured while attempting to couple certain cars equipped with automatic couplers. Plaintiff, knowing that it was dangerous to do so, attempted to open the coupler of a moving car attached to the engine by running in advance of it, and while so doing was caught by a nail projecting from the brake beam, thrown down, and run over. Plaintiff could have stopped the car and opened the coupler on it and then signaled the engineer to back and make the coupling, or he could have signaled for reduced speed run ahead of the car, and opened the coupler on the standing car, either of which methods would have been safe. Held, that plaintiff's contributory negligence in attempting to effect a coupling in a dangerous manner, when other safe ways were open to him, and not the presence of the nail in the brake beam, was the proximate cause of the accident, and the plaintiff could not therefore recover.

Gillet, J., dissenting.

Appeal from Superior Court, Porter County; Harry B. Tuthill, Judge.

Action by Fred O. Hamlin against the New York, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Case transferred from Appellate Court under Acts 1901, p. 565, c. 247. Reversed.

Modified opinion for former opinion, see 79 N. H. 1040.

Olds & Doughman, for appellant.

Marion E. Barnhart, V. S. Reiter, and *L. L. Bomberger,* for appellee.

HADLEY, J. Appellant appeals from a judgment rendered in favor of appellee for personal injuries claimed to have been caused by the former's negligence. The accident happened at Stoney Island, a large distributing switchyard of appellant near the city of Chicago, in the early morning of July 1, 1903. The plaintiff, a practical switchman of 16 years' experience, was employed by appellant, and was acting as head switchman of a crew engaged at Stoney Island in breaking up trains as they arrived in the yard, and switching the cars to the various roads and tracks to which they severally belonged. The plaintiff, being the head swichman, had control over the movements of the engine, and it was the duty of the engineer (which was faithfully performed) to respond to whatever signals the plaintiff communi-

Ry. Co. (N. Car.), 24 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547; foot-notes appended to Chicago, etc., R. Co. *v.* Chestnut Bros. (Ky.), 24 R. R. R. 108, 47 Am. & Eng. R. Cas., N. S., 108; foot-notes appended to Thompson *v.* Cleveland, etc., Ry. Co. (Ill.), 23 R. R. R. 233, 46 Am. & Eng. R. Cas., N. S., 233; Stone *v.* Union Pac. R. Co. (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

cated. About 4 o'clock on the morning of July 1, 1903, No. 35, a mixed train of about 20 cars, arrived at Stoney Island from Buffalo, and the crew to which the plaintiff belonged was set to work distributing it. Prior to breaking up the train, however, competent car inspectors examined the train, and one Medland, an inspector, testified that he discovered on car No. 3847, Duluth, South Shore & Atlantic, from Buffalo, a projecting nail, to wit, a bolt went through the end of a brake beam which hung about 15 inches above the surface of the track, and immediately over the rail, and rested about 6 inches back of the end of the car, which bolt passed through the brake head and projected outward toward the end of the car about 1½ inches. Through the projecting part of the bolt was a slot immediately outside the nut, and through the slot, as ordinarily constructed, should have been inserted a soft iron split key, turned backward around the bolt to prevent the escape of the nut. The soft iron key was missing, and in its stead a nail had been forced through the slot, and the point turned outward toward the end of the car, and thus projected about 1 inch further than the bolt. Two cars had been thrown out of the train on the main track and left standing. A little later the engine, pushing five cars, under the direction of the plaintiff, started down the track to pick up the two standing cars. The cars were backing toward the west. The plaintiff was riding on the side ladder near the northwest corner of the advanced car, which was car No. 3847 containing the projecting nail. It was equipped with the Trojan coupler. The standing car had a coupler that coupled in the same way. The cars, by the devices, coupled by opening the knuckle of either one of the cars. It was not necessary to open both. The manner of coupling by these devices was by raising with the left hand a lever located under the northwest corner of the car the plaintiff was riding to a holding notch that would support the lever. The lever would thus release the knuckle, and then the coupling might possibly be accomplished by reaching round the end of the moving car and with the right hand open the knuckle of the moving car, then clear the track, and let the cars collide and make the coupling; or the coupling might have also been made by going in advance of the moving car to the standing car and to the other side of the track, to the south-east corner of the standing car, lifting the lever to the notch, opening the knuckle, then recross the track to the north side (the engineer's side) to give the necessary signals; or the coupling might be made by stopping the moving car until the knuckle in it, or in the standing car, could be opened, and then signaling a collision of the cars. On the occasion of the accident the plaintiff rode the moving car till it drew near to the standing car. He then signaled the engineer to slow up, which he did, to the rate of two miles an hour. The plaintiff then lowered himself from the ladder, and lifted the brake lever with

his left hand. The notch was out of repair and would not hold the lever, so holding the lever in his hand, he stepped in front of the moving car, stepped over the rail, first with his right foot, extending his right hand, and laying it upon the coupler to open the knuckle, and as he carried his left foot over the rail something caught him on the inside of the left leg midway between the foot and the knee, which threw him to the track between the rails, and the forward trucks passed over him inflicting the injuries for which he sues. The presence and position of the nail was not reported to the company, was not repaired, and no notice thereof was given to the plaintiff and other employees whose duty it was to handle and manage the train. The plaintiff had no knowledge of the nail, and could not testify that it was the nail that caught him and caused him to fall on the railroad track. The substance of these facts was averred in two paragraphs of complaint. A demurrer to each paragraph for insufficiency of facts was overruled. There was an answer of general denial, verdict for appellee, and answers to interrogatories. A motion for judgment on the answers to interrogatories was overruled, as was also appellant's motion for a new trial. An assignment of error is made on all adverse rulings. Was the complaint sufficient against the demurrers?

The negligence alleged in the first paragraph was that the defendant hauled from Buffalo a certain defective and dangerous car, No. 3847, belonging to the Duluth, South Shore & Atlantic Company. The defect is described, and then it is averred "that a large nail was negligently placed and maintained on said brake beam in a bent condition that projected and extended outward from the brake beam toward the end of the car a distance of about 4 inches, and was about 18 inches above the surface of the ground, and in such a position as to come in contact with the person and clothing of the switchman engaged in coupling that end of said car. It is then alleged that the plaintiff had no knowledge of the defective and dangerous condition in time to avoid it, and the defendant negligently failed to give him notice thereof, although the defendant might have discovered it upon reasonable inspection, by reason whereby the defendant negligently failed to furnish the plaintiff with a safe place to work and with safe appliances. The second paragraph is like the first, except it is averred that immediately upon its arrival in the yard at Stoney Island the defendant inspected the car, and found the defective condition described, and knowing of said condition the defendant negligently failed to repair, though it had plenty of time, and wholly failed to give the plaintiff notice, or warning thereof. The objection presented in these paragraphs by appellant's counsel is that neither states sufficient facts to constitute negligence in appellant that appears to be the direct or proximate cause of the plaintiff's injuries. In a nutshell, the first paragraph appears

to be based upon a failure to inspect a foreign car, and the second paragraph, upon a failure to repair, or to give the plaintiff notice of the defect. When a railroad company in the general conduct of its business receives a foreign car to be transported over its lines, or handled by its employees in its general switchyards, it must under all circumstances exercise such reasonable care as the time, place, and exigencies of business will permit to inspect such car to ascertain if it is in a reasonably safe condition, and if it is found to be out of repair, unfit, or unsafe for the business for which it is being employed, to repair such car to a reasonably safe condition, or to notify those of its employees who may be called upon to handle it of the danger or defect. Railway Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108, and cases cited. So in this case appellee owed the appellant, as one of its switchmen, the duty of giving car No. 3847, from Buffalo, a reasonable inspection, which it is averred in the first paragraph of the complaint it did not do, and furthermore it was a duty owing to the plaintiff to mend any discovered defect, or dangerous condition, or to notify the plaintiff of the existence thereof, all of which, it is alleged in the second paragraph the defendant failed to do. Neither paragraph of the complaint is subject to the general objection stated, and no special objection to either paragraph being pointed out, we hold both paragraphs sufficient.

Was appellant entitled to judgment upon the answer of the jury to interrogatories? The answers referred to are to the following effect: The plaintiff was injured while attempting to make a coupling between car No. 3847, "D., S. S. & A.," and another car standing on the track (3). Car 3847 was not in good repair (4), on account of a nail projecting from a bolt in the brake beam (4½), which brake beam extended within six inches of the forward end of the car (5). Immediately before his injuries the plaintiff was riding on the outside ladder of the forward end of a short train that was backing down to couple onto a car standing on the track (6). When injured the plaintiff was in front of the moving car, right hand on knuckle, and left hand hold of lever trying to open knuckle when he fell (9). The car was moving two miles per hour (10). When the plaintiff jumped from the ladder to the ground and entered in front of the car, the bolt in the brake beam was not in his full view (12). But the plaintiff might have seen the end of the brake beam containing the bolt before entering upon the track if he had looked (13). The plaintiff, at the time, had control of the movements of the engine pushing the cars, by having command of the engineer in charge, whose duty it was to obey the signals and directions of the plaintiff (14, 15, 16). The coupling of the cars attempted by the plaintiff might have been made without injury to himself by going in advance of the moving car and opening the knuckle on the standing car, and then permitting the cars to

come together (17). The plaintiff, by slackening the speed of the moving car, might have made the coupling with safety to himself by leaving the moving car two or three lengths distant from the standing car, and going in advance of the moving car, and opening the knuckle on the standing car and then waiting the impact (21). If the plaintiff had attempted to make the coupling by advancing and opening the knuckle on the standing car without stopping the movements of the advancing cars, it would not have materially delayed the work (22). The plaintiff could have signaled and stopped the movement of the advancing cars, and then opened the knuckle upon one of them, and then signaled the backing of them together (24), which would have delayed operations about one minute (25). The plaintiff had been engaged as switchman on this and other railroads for 16 years (26), and was an experienced switchman (27). It was dangerous to attempt to open the coupling on the moving car by running in advance of it as the plaintiff was attempting to do at the time of the accident (28). The plaintiff, for lack of time, and from having his back to the moving train, could not have safely made the coupling by advancing to and opening the knuckle on the standing car (29). The plaintiff could have made the coupling with safety to himself by stopping the movement of the car upon which he was riding and opening the knuckle thereon and causing the car to advance to the other (31). The engineer in charge of the locomotive would, upon signal from the plaintiff, have reduced the speed of the moving car to a rate which would have given the plaintiff time to have left the moving car and advanced to and opened the knuckle on the standing car, and cleared the track, before the moving car arrived within dangerous proximity of the standing car (35). At the time of the accident it would not have been a safer method for the plaintiff to have signaled a slower movement of the cars, and then gone ahead of the moving car and opened the knuckle of the standing car than it was to attempt to open the knuckle of the coupling upon the moving car by raising the lever and stepping in front of the moving car (35). It was unsafe for the plaintiff to attempt to open the coupler of the moving car by stepping in front of it as he did at the time he was injured (40, 41). The brake beam which extended over and about 14 inches above the rails had a bolt through the north head pointing forward, and which bolt had a slot through it immediately outside the nut, and through the slot a nail had been forced and bent forward, and thus projecting about one inch further forward than the end of the bolt (43 to 47, inclusive). The plaintiff fell in front of the car from being caught on the left leg below the knee, and tripped by the projecting nail (48, 53 to 56).

Appellee insists that certain of these answers relating to material questions of fact are in positive conflict, and should therefore be

held as destroying each other, and disregarded in passing upon the general effect of the answers as a whole. Those called in question we quote: "Q. Was it not the duty of the engineer in charge of the engine pushing the cars at the time of the accident to obey the signals and directions of the plaintiff? A. Yes. Q. Could not the coupling which the plaintiff was attempting to make at the time of the accident have been made with safety to himself by stopping the movement of the car upon which he was riding and opening the knuckle thereon, and then causing the car to advance and make the coupling? A. Yes. Q. If the plaintiff had stopped the moving car and opened the knuckle and then moved it forward to the standing car, how much, if any, would it have delayed the business at which he was engaged? A. About one minute. Could not the plaintiff have made the coupling he was about to make when injured with safety to himself by slackening the speed of the moving car two or three cars lengths distant from the standing car, and going in advance of the moving car and opening the knuckle of the coupler on the standing car, and then stepping outside the track and allowing the cars to come together and couple? A. Yes. Q. Would not the speed of the moving car have been reduced by the engineer on signal from the plaintiff to a rate of speed allowing the plaintiff time to have left the moving car and gone in advance of it to and opened the knuckle of the standing car and cleared the track before the moving car arrived in dangerous proximity of the standing car, if the plaintiff had signaled the engineer to do so? A. Yes. Q. Was not the plaintiff injured by attempting to open the knuckle of the coupler upon the car while the same was in motion by stepping immediately in advance of it? A. Yes. Q. Was it not unsafe to attempt to open the knuckle and make the coupling in the manner the plaintiff attempted to do it at the time he was injured? A. Yes." Those claimed to be per contra are: "Q. 29. could not the coupling the plaintiff was attempting to make have been made safely and without injury to him by his going in advance of the moving car and opening the knuckle upon the standing car? A. No. Q. 30. If you answer the foregoing 'No,' then answer 'Why?'" A. For lack of time and for having his back to the moving train. Q. 49. Could not the plaintiff have made the coupling he was attempting to make at the time of the accident with perfect safety by having gone in advance and opening the knuckle on the standing car, which was to be coupled on the moving car, and stepping outside the tracks, and allowing the cars to come together? A. No." (35) It is further answered that it was not the safer method to make the coupling for the plaintiff to have gone ahead of the moving car and opened the knuckle of the standing car than it was to attempt to make it by stepping in front of and attempting to open the coupling of the moving car.

Upon first impression these answers seem to present a case of

conflict. But before condemning them it is the duty of the court to take into consideration all the interrogatories and answers, and construe them together as one document. As said in Byram v. Galbraith, 75 Ind., at page 139: "The answers upon which judgment may be rendered in opposition to a general verdict, under section 337 of the practice act, Rev. St. 1876, p. 17, are all the answers taken together, and not some without others." And while the court should avoid straining the language to escape a conflict, it should at the same time give the questions and answers as a whole a reasonable construction. Railway Company v. Hedges, 118 Ind. 5, 12, 20 N. E. 530. It should not be held that the presumptions and intendments that arise in support of a general verdict arise also to establish a contradiction in the special answers and finding of the jury, except in cases of doubt, that construction should be adopted which probably sustains the conflict. It should at least be presumed that the jury intended to make their answers consistent, and not self-destructive, and in due respect to the intentions of the jury the court should make a fair and reasonable effort to determine from the body of the findings the true intent and meaning of the jury. In Seekel v. Norman, 78 Iowa, 254, 43 N. W. 190, it was held, as indicated by the headnote: "Special findings will be understood and interpreted according to the evident intention of the jury, as shown by other and collateral findings, and not by the mere letter of the interrogatory which the jury answers 'Yes,' or 'No.'" In Alhambra, etc., Co. v. Richardson, 72 Cal. 598, 14 Pac. 379, it is held that answers to interrogatories should be construed to avoid contradiction, if it can be reasonably done, and "when doubtful or obscure reference may be had to the context for the purpose of ascertaining the true meaning." See, also, Brown v. O. & M. R. Co., 138 Ind. 648, 655, 37 N. E. 717, 38 N. E. 176; Elliott, Genl. Pr. § 932; 20 Ency. Pl. & Pr. p. 569.

The apparent conflict and inconsistency in the foregoing answers disappear when the real intention of the jury is sought for. Other answers disclosed that the moving car was under the direction of the plaintiff, and that in making the coupling it was necessary to open the knuckle on but one of the cars, and that one might be on either the moving or the standing car. It will be observed that there were two ways in which the coupling the plaintiff set about to make might have been accomplished by him with safety to himself, namely: (1) by stopping the car he was riding, opening the knuckle thereon, and then signaling its forward movement to make the coupling; or (2) by signaling a slowdown of the moving train, and leaving the car he was riding when two or three lengths from the standing car, he then might safely have gone forward and opened the knuckle of the standing car, and cleared the track before the arrival of the moving car to make the coupling.

It is evident from the interrogatories and answers Nos. 29 and 30 that the jury had in mind, when they made the said last four answers, the nearness of the cars at the moment that the plaintiff entered upon his attempt to make the coupling. Interrogatory No. 29. calls attention to the coupling the plaintiff was attempting to make, that is, was already engaged in trying to make, and as relating to that particular time the answer is, he could not, with safety to himself, have made the coupling by going forward and opening the knuckle of the standing car; and the reason he could not have done so is given in the answer to interrogatory No. 30, "For lack of time and for having his back to the moving car." It is altogether possible for the cars to have been so close together at that particular time that it was just as safe to attempt to open the knuckle of the moving car by stepping in front of it as it would have been with back to the approaching car, to have attempted to reach the standing car, open the knuckle, and clear the track before the cars came together. It is only reasonable to construe the latter answers as referring to the particular time designated, and by so doing we make all the answers consistent and free from conflict. But should it be conceded that the answers with respect to going forward and opening the coupling on the standing car are contradictory, and should be disregarded, the condition of appellee's case would be but little improved; for there is no pretense that there is a conflict in the answers with respect to safety in making the coupling if the plaintiff had pursued the course of stopping the moving car and opening the coupling on it. The stopping method was found to be open and safe to the plaintiff, but the stepping in front of the moving car, as the plaintiff did to open the knuckle, was found to be a dangerous thing to do.

Upon the strength of these findings appellant insists that, even though car No. 3847 was out of repair and defective by reason of having the nail projecting from the bolt in the brake beam, yet if appellee had used due care in his method of making the coupling, no harm would have come to him from the nail; and to sustain the contention invokes the well-established rule, found in the domain of master and servant, that when there are two known ways of doing a thing, one safe and the other unsafe, if the servant voluntarily and knowingly chooses, because easier or more convenient, or for other personal reasons, the unsafe way, he will be held guilty of negligence, and if injured by reason of such negligence, will have no remedy. Coal Co. *v.* Hoodlet, 129 Ind. 327, 27 N. E. 741; Publishing Co. *v.* Beaumeister, 102 Va. 677, 47 S. E. 821; Schoultz *v.* Eckardt Co., 112 La. 568, 36 South. 593, 104 Am. St. Rep. 452; Gilbert *v.* Railroad Co. (C. C.) 123 Fed. 832; Morris *v.* Duluth Ry. Co., 108 Fed. 747, 47 C. C. A. 661; Railroad Co. *v.* Estes, 37 Kan. 715, 731, 732, 16 Pac. 131; Carrier *v.* Railway Co., 61 Kan. 447, 59 Pac. 1075;

Haven *v.* Bridge Co., 151 Pa. 620, 25 Atl. 311; 1 Bailey, Personal Injury, §§ 1121, 1123; 5 Thompson's Negligence, § 5372, and cases collated; Quirouet *v.* Ala., etc., Co., 111 Ga. 315, 318, 36 S. E. 599; Moore *v.* Kansas, etc., Co., 146 Mo. 572, 48 S. W. 487. In the Pennsylvania case the defendant was reconstructing a bridge. To accommodate travel while taking down the old bridge the roadway was prepared to accommodate both vehicles and foot passengers while the footways were being demolished. They were torn up for more than halfway. The entrances to the footways were blocked, and the sentry informed the plaintiff and companion that they would have to take the roadway as the footpaths were unfit for travel. They took the roadway, and when about two-thirds over they left the roadway and entered upon the footway at a point where the workmen had not reached in their work of tearing up. The roadway was perfectly safe for the rest of the distance. On the footway the plaintiff stepped on a board lying bottom side up, with a nail protruding upward, that penetrated the plaintiff's shoe, causing her to fall and injure herself. At page 627 of 151 Pa., page 312 of 25 Atl., the court say: "The case is brought directly within the familiar line of decisions, which hold that, when a person, having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence, and cannot recover." In the Quirouet Case the plaintiff, an employee, attempted to board a loaded flat car, moving in a train at the rate of five or six miles an hour, and which car was the fourth from the caboose, the proper car for him to board, and which was equipped with low and convenient steps and could have been boarded with perfect safety. In his effort to board the flat car he put his foot upon the journal, or grease box, and springing, threw his hand and wrist around a heavy standard in the side of the car, which rolled in its socket, causing the plaintiff's foot and leg to fall under the wheels. The court said with respect to these facts: "While it was more convenient, still he (plaintiff) could have reached the car by going first upon the caboose. * * * which had appropriate appliances for going upon it, and it was his duty to have used the more appropriate and less dangerous method. In such cases the use of the more dangerous method, even though it be the greater convenience, will preclude recovery, if injury results. * * * If there are two apparent ways of discharging the required service, one more dangerous than the other, the employee is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former and is injured thereby." In section 1121 Mr. Bailey says: "It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where an employee of a railroad knowingly selects a dangerous way when

a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." The rule is rooted in the principle of public policy that enjoins upon every one the duty of exercising due care to preserve his body and health from mutilation and injury. The individual is given strength, reason, ears, and eyes as a means of general protection, and he is in duty bound to employ these under all circumstances in a reasonable manner for the promotion of his own personal safety. So in whatever station or place he may be, the employee is never excused for an abandonment of care in the avoidance of bodily harm. Even the quantum of care, imposed by law upon the master, in providing a suitable and safe working place and appliances for his servant, does not in any degree diminish the servant's duty to take care of himself and heed any apparent danger, whether the same is usual or extraordinary; and a servant with knowledge of existing perils, gained through observation, or from a long continuance in the business, is bound to make use of such knowledge, and look out for such dangers as experience has taught him are liable to produce injury. Coal Co. *v.* Hoodlet, 129 Ind. 327, 27 N. E. 741; Railroad Co. *v.* Finney, 145 Ind. 551, 558, 42 N. E. 816; Railroad Co. *v.* Ostman, 146 Ind. 452, 464, 45 N. E. 651. The plaintiff had been for 16 years employed as a switchman in the yards of appellant and others, and was chargeable with knowledge that it was unsafe to step in front of a moving car to open the knuckle preparatory to a coupling, and also bound to know that a safe way to effect a coupling was to cause the moving car to be stopped until the necessary adjustment of the coupling could be made. He had both knowledge of the hazard and the authority to make the safe way available, and having, with his eyes open, voluntarily chosen the unsafe way, we see no escape from bringing his case within the operation of the rule above stated. 1 Bailey's Personal Injuries, § 1125. At the time he selected the unsafe method he had before him two safe ways, both available, and both under his absolute control, and neither of which would have delayed the movement of the cars more than one minute. "It is abhorrent to reason and common sense," says the court in Loranger *v.* Railway Company, 104 Mich. 80, 62 N. W. 137, "to say that it is good and safe railroading and careful conduct for a brakeman to step in front of a train moving as fast as a fast walk, and perform the service which requires him to step sideways to keep out of the way, knowing that death is almost sure to follow should he miss his footing."

We are unable to accept the contention that, assuming the answers show that appellee was guilty of negligence, and took the risk of going in front of the moving car, his conduct should not avail appellant as a defense, because it is also shown by the answers that it was the nail projecting from the brake beam, and not his entry upon the track in front of the moving car, that con-

stituted the proximate cause of his injury. The nail of itself was harmless. It was a source of danger only when in motion by the car, and then ordinarily only to one in a place where he had no right to be. At most it was but a subsidiary or concurring cause. There has been much learning indulged by the courts in defining the distinction between the paramount or efficient cause of an accident and the causes that are merely incidental, or instrumental, to the superior responsible agency. Being the nearest in order of time is no criterion. The proximate cause is that cause which originates and sets in motion as the dominating agency that necessarily proceeds through other causes as mere instruments, or vehicles, in a natural line of causation to the result. Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Billman *v.* Railroad Company, 76 Ind. 166, 40 Am. Rep. 230. No one can say that the plaintiff would not have fallen on the railroad track, if the nail had been absent from the brake beam, but it may be said, with certainty, that if he had not wrongfully gone to, and cast himself upon, the nail, it would not have harmed him. Suppose appellee, desiring to cross to the other side of the track, attempted to do so by crossing under one of the cars of the moving train. While under the car in transit an unexpected and unknown broken rod caught his clothing and delayed him so that he was overtaken and injured by the wheels. Could it be said in that case that the broken rod was the efficient and proximate cause of the injury? Such a parallel cannot be avoided by saying that in going under the car he went into a dangerous place where his business did not call him, and where he was not expected to go, for appellee did precisely that thing when he attempted to open the knuckle of car 3847 in the manner he did.

We think the answers to the interrogatories clearly show that the plaintiff was guilty of contributory negligence, and that the appellant's motion for judgment thereon in its favor should have been sustained. The judgment is therefore reversed, with instructions to sustain appellant's motion for judgment in its favor on the interrogatories, and to render judgment in favor of appellant for costs.

Judgment reversed.

MONKS, J., concurs in result.

GILLETT, J., dissents with opinion.

LIQUID CARBONIC CO. *v.* NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia, Sept. 12, 1907.)

[58 S. E. Rep. 569.]

Carriers—Limiting Liability—Claims for Damages—Notice.*—A stipulation in a bill of lading of a carrier that, unless claims for damages are made within 30 days, the carriers shall not be liable in any event, does not exonerate the carrier from negligence, in violation of Va. Code 1904, § 1294 l, providing that no contract shall exempt any carrier from liability, and is a reasonable regulation, and the failure to present a claim for damages within the time prescribed relieves the carrier from liability.

Error to Circuit Court, Wise County.

Action by the Liquid Carbonic Company against the Norfolk & Western Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Vicars & Peery, for appellant.
E. M. Fulton and *C. T. Duncan,* for appellee.

KEITH, P. This was an action brought in the circuit court of Wise county by the Liquid Carbonic Company, a corporation, to recover from the Norfolk & Western Railway Company for damage to certain goods which the defendant railway company, as a common carrier, undertook to transport from Pittsburg, Pa., and to deliver to the plaintiff at Coeburn, one of its stations in Wise county, Va.

The bill of lading contained among other provisions the following condition: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

Claim was not made in accordance with this stipulation, nor do we find in the record any evidence of waiver, or other cause why the defendant should not have relied upon it. The question fairly presented, then, is: Does it present a defense to this action?

There was a verdict for the defendant, and the plaintiff in the court below obtained a writ of error from this court; and its petition contains several assignments of error, but also states that "it is unnecessary to discuss in detail all of the foregoing assignments of error, because if the fourth assignment be well taken the judgment complained of must be reversed, and if it is not

*See note at end of case.

well taken the other assignments of error are immaterial." We shall, therefore, confine our consideration to this assignment, which brings up for review instruction A, given on behalf of defendant in error, as follows: "The court instructs the jury that unless they believe from the evidence that the plaintiff, or some one for it, did within 30 days after the delivery of the goods in question to Dingus & Kelly make claim for its (plaintiff's) alleged damages, and deliver such claim in writing to the agent of the defendant railroad company at Coeburn, Va., they shall find for the defendant."

By section 12941 of the Code of 1904 it is provided: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall itself be *prima facie* evidence of negligence, and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover in a proper action the amount of any loss, damage or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company aforesaid through whose negligence the loss, damage or injury may be sustained. No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

There is a class of cases which holds that such a provision as that under consideration, while generally valid in those states not having a statute or statutes prohibiting the limitation of the common-law liability, is of no avail as against a statute which prohibits any limitation of the common-law liability.

In 6 Cyc. pp. 505, 506, it is said: "It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of or damage to the goods shall be given to the agents of the carrier within some specified time, such as 30 or 90 days, and that unless such notice is given there will be no liability on the part of the carrier, and such stipulations are generally upheld so far as they are found to be reasonable. Cases holding such stipulations to be invalid are usually based on the ground that the terms thereof are unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore

as ineffectual against a claim for loss or injury due to the carrier's negligence, and also as invalid where limitation of common-law liability is prohibited by statute." Cases are cited from several states in support of the text.

On the other hand, Hutchinson on Carriers (3d Ed.) § 442, says: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after the loss has occurred; and when such conditions are reasonable the owner will be precluded from the right to maintain an action against the carrier unless he has presented the notice within the time stated and in the manner provided. The object of conditions of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make it difficult, if not impossible, for him to ascertain their truth. It is just, therefore, that the owner, when a loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim according to the reasonable conditions of the contract."

A great number of cases hold that a provision identical in terms, or in some cases less favorable to the shipper than the one under consideration, is reasonable and should be enforced—among them Simons *v.* Great Western Ry., 86 E. C. L. 804, where it was held by the Court of Common Pleas that a condition in a bill of lading was just and reasonable which provided that "no claim for damages will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered;" and Lewis *v.* Railway Co., 5 Hurl. & N. 867, where a stipulation was held to be reasonable to the effect that "no claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered."

Express Company *v.* Harris, 51 Ind. 127, Capehart *v.* S. & R. R. Co., 77 N. C. 355, and Texas Cent. R. Co. *v.* Morris, 16 Am. & Eng. R. Cas. 259, are to the same effect.

In Black *v.* Wabash R. Co., 111 Ill. 351, 53 Am. Rep. 628, a bill of lading requiring notice of claim in writing within five days was held valid; the court saying: "The manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence to promptly present their claims for adjust-

ment while the facts and circumstances upon which they are based are fresh in the memories of parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants." See, also, Sprague *v.* M. P. R. Co., 34 Kan. 347, 8 Pac. 465.

In Pavitt *v.* L. V. R. Co., 153 Pa. 302, 25 Atl. 1107, the court sustained as valid a stipulation, in a bill of lading for the transportation of horses, providing that the shipper must make claim in writing within five days from date of unloading; the court saying: "It is settled from all the authorities that such a provision as this, inserted in a contract by a common carrier, is reasonable and will be enforced. It is proper, because the demand promptly made gives warning and enables the carrier, while evidence is attainable and recollection clear, to institute inquiry into the merits of the claim, and thus guard against fraud or overvaluation." See, also, Armstrong *v.* Chicago, M. & St. P. Ry. Co., 53 Minn. 183, 54 N. W. 1059; Selby *v.* Railroad, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; C., C., C. & St. L. Ry. *v.* Newlin, 74 Ill. App. 638; American Grocery Co, *v.* Staten Island R. T. Co., 51 N. Y. Supp. 307, 23 Misc. Rep. 356; St. Louis & San Francisco R. Co. *v.* Hurst, 67 Ark. 407, 55 S. W. 215.

Let us consider for a moment the authorities bearing upon the effect of the statute heretofore quoted upon this provision.

In Gulf & Santa Fe R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, treating of the effect of a statute of the state of Texas upon such a stipulation, it is said: "The statutes of this state only forbidding such contracts as would limit or restrict the common-law liability of carriers, we see no reason why contracts executed upon sufficient consideration and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts."

In Goggin *v.* Kansas Pac. Ry. Co., 12 Kan. 416, Chief Justice Kingman said: "It is undoubtedly settled that the common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract; but it seems that he cannot relieve himself from liability for his own negligence. The contract pleaded does not pretend to relieve the defendant from the consequences of his own negligence. It only stipulates that the shipper shall on his part perform certain duties."

See, also, Southern Express Co. *v.* Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385, and Sprague *v.* M. P. R. Co., *supra,* where the court said: "The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the com-

pany from fraud and imposition in the adjustment and payment of claims for damages, by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

On this point see, also, Pavitt *v.* L. V. R. Co., *supra*; Case *v.* C., C., C. & St. L. Ry. Co., 11 Ind. App. 517, 39 N. E. 426; B. & O. S. W. Ry. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

The Supreme Court of the United States, in Southern Ex. Co. *v.* Caldwell, 21 Wall. 264, 22 L. Ed. 556, treats of this subject as follows:

"The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within 90 days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit.

"It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law, and inoperative. * * * A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity which the strictest rules of the common law ever required. And it is intrinsically just as applied to the present case. * * * If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation, within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons, such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers."

We are of opinion that there was no error in the instruction complained of, that it is decisive of this controversy, and that the judgment should be affirmed.

Note

COMMON CARRIERS—VALIDITY AND EFFECT OF CONDITION OF SHIPPING CONTRACT PURPORTING TO LIMIT TIME WITHIN WHICH CLAIM FOR LOSS OF OR DAMAGE TO FREIGHT MAY BE MADE.

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Cross References.

Stipulation Requiring Notice of Claim for Injuries to Live Stock to Be Given to Carrier before It Is Removed by Consignee or Mingled with Other Stock.—For general note on this subject, see 6 Am. & Eng. R. Cas., N. S., 632, et seq.

A. GENERAL RULE.

Such a stipulation is valid if the limit of time fixed is not unreasonably short with reference to the circumstances of the case in question.

United States.—Southern Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264; The Arctic Bird (D. C.), 109 Fed. Rep. 167; The Naranja (D. C.), 104 Fed. Rep. 160; The St. Hubert (C. C. A.), 107 Fed. Rep. 727.

Georgia.—Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874.

Illinois.—Baltimore & Ohio S. W. R. Co. *v.* Fox, 105 Ill. App. 54; Black *v.* Wabash, St. L. & Pac. Ry., 111 Ill. 351, 25 Am. & Eng. R. Cas. 388; Chicago, etc., Ry. Co. *v.* Bozarth, 91 Ill. App. 68; Chicago & Alton R. Co. *v.* Simms, 18 Ill. App. 68; Coles & Co. *v.* Louisville, E. & St. L. R. Co., 41 Ill. App. 607.

Indiana.—Anderson *v.* Lake Shore, etc., R. Co., 26 Ind. App. 196; Baltimore & Ohio S. W. Ry. Co. *v.* Ragsdale, 14 Ind. App. 406; Case *v.* Cleveland, etc., Ry. Co., 11 Ind. App. 517; Louisville, etc., Ry. Co. *v.* Widman, 10 Ind. App. 92; Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026; United States Express Co. *v.* Harris, 51 Ind. 127; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222.

Kansas.—Atchison, etc., Ry Co. *v.* Morris, 65 Kan. 532, 70 Pac. 651.

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Minnesota.—Armstrong *v.* Chicago, etc., Ry. Co., 53 Minn. 183, 54 N. W. 1059.

Mississippi.—Southern Express Co. *v.* Hunnicutt, 54 Miss. 566.

Missouri.—Dawson *v.* St. Louis, etc., Ry. Co., 76 Mo. 514; McBeath *v.* Wabash, St. Louis & Pac. Ry. Co., 20 Mo. App. 445; Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

New York.—American Grocery Co. *v.* Staten Island R. T. R. Co. (N. Y. Sup. Ct.), 23 Misc. Rep. 356, 51 N. Y. Supp. 307; Jennings *v.* Grand Trunk Ry., 127 N. Y. 438, 28 N. E. 394; Hirschberg *v.* Dinsmore, 12 Daly (N. Y. Com. Pl.) 429.

Oklahoma.—St. Louis, etc., R. Co. *v.* Phillips (Okl.) 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

Pennsylvania.—Eckert *v.* Pennsylvania R. Co. (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475, 60 Atl. 781; Wolf *v.* Western Union Tel. Co., 62 Pa. St. 83.

Tennessee.—Glenn & Co. *v.* Southern Express Co., 86 Tenn. 594, 8 S. W. 152, 35 Am. & Eng. R. Cas. 627; Southern Express Co. *v.* Glenn, 84 Tenn. 472, 1 S. W. 102.

Texas.—Gulf, etc., Ry. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567.

In a contract to transport live stock, a provision requiring notice of a claim for damages to be made within a stipulated time is valid. So held in Eckert *v.* Pennsylvania R. Co. (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475, 60 Atl. 781.

Loss of Money—Thirty Days after Delivery to Express Company.—A provision in a receipt issued by an express company that the company shall not be liable for money lost by its default, unless claim therefor is made in writing, at its office, within thirty days after its delivery to the company, is valid. So held in Glenn *v.* Co. *v.* Southern Express Co., 86 Tenn. 594, 8 S. W. 152, 35 Am. & Eng. R. Cas. 627.

A condition in print, at the foot of a receipt of an express company for a package, "that the express company shall not be liable for any loss, unless claim therefor shall be made in writing at this shipping office within thirty days from this date, in a statement to which this receipt shall be attached," is a condition with which the shipper must comply, or lose his claim. So held in Southern Express Co. *v.* Hunnicutt, 54 Miss. 566.

Sixty Days from Date of Sending Telegraph Message—Stipulation in Small Type.—One of the stipulations of a telegraph company, printed in their blank form, was that they would not be liable for damages if the claim was not presented in sixty days from sending the message. It was held that the condition was binding upon a person sending a message on the printed form, although such stipulation was in very small type, but with a heading directing to it in conspicuous type. So held in Wolf *v.* Western Union Telegraph Co., 62 Pa. St. 83. See also, Hill *v.* Western Union Telegraph Co., 85 Ga. 425, 11 S. E. 874.

Five Days from Removal of Stock from Cars.—A stipulation that claim shall be made in writing within five days from the time the stock is removed from the cars is prima facie valid, unless it has been waived or unless it appears that the facts concerning its execution are such as to relieve the shipper from its operation. So held in Cleveland, etc., Ry. Co. *v.* Newlin, 75 Ill. App. 638.

Twenty-Four Hours after Discharge of Cargo—Proof That All Bags Were Delivered on Deck.—In The Naranja (D. C.), 104 Fed. Rep. 160, it appeared that the bill of lading for a shipment of almonds in bags required the consignee to receive the goods as delivered over the ship's side, and also provided that notice of any claim should be given within twenty-four hours after discharge; that, although having

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due notice, the consignee did not appear until three days after the discharge had commenced and on the day it was completed, and did not count the bags until four days after, and that several weeks afterwards a claim was made for a shortage of several bags. It was held that under the terms of the shipping contract and the facts shown the vessel was not liable for the shortage, it being shown that all the bags shipped were delivered on the deck.

Notice Must Be Given Shipowner within Reasonable Time although Stipulation of Bill of Lading Is Unreasonable.—In The St. Hubert (D. C.), 102 Fed. Rep. 362, it is held that a stipulation of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," even if conceded to be unreasonable and void as to the time within which it requires the notice to be given, is valid, and will be enforced to the extent of requiring notice to be given, and it must be given within a reasonable time, or the right to recover on a claim for damage to the freight will be barred.

Negligence.—A railroad, as a common carrier, may, for a valuable consideration, contract that, if damage result to freight by reason of its negligence, or that of its agents, servants, or employees, the shipper shall give notice of the damage within a reasonable time. So held in Atchison, etc., Ry. Co. *v.* Morris, 65 Kan. 532, 70 Pac. 651.

B. PUBLIC POLICY.

Such a condition of a shipping contract is not necessarily void as against public policy.

Black *v.* Wabash, St. L. & Pac. Ry., 111 Ill. 351, 25 Am. & Eng. R. Cas. 388; Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30; St. Louis, etc., R. Co. *v.* Phillips (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

Thirty-Six Hours after Notified of Arrival.—A condition in a shipping contract that all claims for damages against the carrier should be reported by the consignee in writing, within 36 hours after he had been notified of the arrival of the freight at its destination, is not void as against public policy. So held in Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

Written Claim—Affidavit—General Freight Agent—Five Days from Unloading of Stock.—In Black *v.* Wabash, St. L. & Pac. Ry. Co., 111 Ill. 351, 25 Am. & Eng. R. Cas. 388, it is held that a stipulation in a shipping contract, voluntarily and understandingly entered into by the shipper, that in consideration of a reduced rate no claim for damages accruing to the shipper shall be allowed or paid by the carrier, or sued for in any court, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the carrier, at his office, within five days from the time such stock is removed from the cars, will be binding upon the shipper, and is not void as being contrary to any law or to public policy.

Responsibility of Carrier May Be Limited.—The responsibility of a common carrier may be limited by an express agreement made with the shipper at the time of its acceptance of the goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound policy. Therefore, an agreement that, in case of failure by the carrier to deliver goods, he shall not be liable, unless a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is not against the policy of the law. So held in St. Louis, etc., R. Co. *v.* Phillips (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

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C. VOID ATTEMPT TO LIMIT LIABILITY.

But in some cases such a stipulation, when rendered unreasonable by the circumstances, has been held void as an attempt to limit the carrier's common-law responsibility for the fault or negligence of itself or its employees. United States Watch Case Co. *v.* Southern Express Co., 120 N. Car. 351, 27 S. E. 74; Smitha *v.* Louisville & N. R. Co., 86 Tenn. 198, 6 S. W. 209.

Within Thirty Days for Loss or Damage to Express Matter.—A condition of a bill of lading issued by an express company that it shall not be liable for loss or damage, unless claim therefor is made within thirty days from the date of the bill of lading is void as an unreasonable attempt to limit its liability. So held in United States Watch Case Co. *v.* Southern Express Co., 120 N. Car. 351, 27 S. E. 74.

Contract Indefinite as to Person to Be Notified—Exemption from Liability for Own Fault.—A stipulation of a contract of affreightment that a shipper of live stock, as a condition precedent to a right to recover against a common carrier for negligent injuries to his stock by the carrier, shall give written notice of his claim to some officer of the carrier, or his nearest station agent, before the stock is removed from the place of delivery, and before it is mingled with other stock, is void for uncertainty as to the person to whom the notice must be given, and because it is an attempt to protect the carrier from liability for losses caused by its own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to recover. So held in Smitha *v.* Louisville & N. R. Co., 86 Tenn. 198, 6 S. W. 209.

Written Notice before Removed or Mingled—Failure of Contract to Specify Officer or Agent.—In Missouri Pac. Ry. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574, it appeared that the railroad company, when sued as a carrier, set up a contract in its answer by which it was agreed that, as a condition precedent to the plaintiff's right to recover damages for loss of or injury to the cattle shipped, the shipper should give notice in writing of his claim to the officers of the carrier or its nearest station agent before the cattle were removed from the place of delivery and before they were mingled with other cattle. It was held that such condition was a limitation of the common-law liability of the carrier, and that a limitation of the common law of a carrier for the proper delivery of articles to a point beyond the limits of Texas, to be recognized, must be reasonable; that the failure of the answer to show that the railroad had an officer or agent so situated that the condition as to giving notice was reasonable, was fatal on demurrer, and that it was doubtful whether, such a contract, which fails by its terms to specify the officer or agent to whom such notice shall be given, when the carrier is a corporation and the cattle are to be delivered in a distant state beyond the line of its road, should ever be held to be reasonable and valid. See also, Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749.

Within Ninety Days from Delivery to Express Company.—But in Southern Express Co. *v.* Calwell, 21 Wall. (U. S.), 264, it is held that an agreement made by an express company, as a common carrier, that it shall not be held liable for any loss of or damage to a package whatever, delivered to it, unless claim be made therefor within ninety days from its delivery to the carrier, is an agreement which the company can rightfully make, the time required for transit between the place where the package is delivered to the carrier and that to which it is consigned not being long, in the present case a

single day. In this case it is said in the opinion: "It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law and inoperative."

D. ATTEMPT TO LIMIT LIABILITY FOR NEGLIGENCE.

And such a condition of the shipping contract will not be applied where to do so would in effect relieve the carrier from liability for the consequences of its fault or negligence or that of its servants. Southern Express Co. *v.* Crook, 40 Ala. 468; Sanford *v.* Housatonic R. Co., 11 Cush. (Mass.) 155; Atchison, T. & S. F. Ry. Co. *v.* Poole (Kan.), 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449, 87 Pac. 465; Cornelious *v.* Atchison, etc., Ry. Co. (Kan.), 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222, 87 Pac. 751; Baltimore & Ohio Express Co. *v.* Cooper, 66 Miss. 558, 6 So. 327, 40 Am. & Eng. R. Cas. 97; Klass Comm. Co. *v.* Wabash R. Co., 80 Mo. App. 164; Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30; Gulf, C. & S. F. Ry. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Missouri Pac. Ry. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574; Missouri Pac. Ry. Co. *v.* Cornwall, 70 Tex. 611, 8 S. W. 312; Westcott & Northrup *v.* Fargo (N. J.), 63 Barb. 349.

A provision in a contract of shipment that all claims for damages against the carrier growing out of the shipment and transportation of freight should be reported by the consignee within a specified time, does not relieve the common carrier of its common-law responsibility for negligence. So held in Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

Receipt Given by Consignees to Carrier—Printed Request to Notice Errors within Twenty-Four Hours.—A receipt given by the consignees of freight to the carrier, acknowledging their receipt in good order, and in which the consignees are requested to notice any errors therein in twenty-four hours, or the carrier will consider itself discharged, does not estop the consignor from suing the carrier for damages caused by negligence in transporting the goods, although no notice thereof was given to the carrier. So held in Sanford *v.* Housatonic R. Co., 11 Cush. (Mass.) 155.

Delay—Loss of Market—Depreciation in Price of Live Stock.—A stipulation in a live stock shipping contract that a written notice of a shipper's claim for damages, given before the removal of the stock from the carrier's pens, should be a condition precedent to a recovery for any loss or injury to stock during transportation, does not apply to damages such as loss of market or depreciation in the market price of live stock, occasioned by the carrier's negligent delay. So held in Atchison, T. & S. F. Ry. Co. *v.* Poole (Kan.), 21 R. R. R. 449; 44 Am. & Eng. R. Cas., N. S., 449, 87 Pac. 465; Cornelious *v.* Atchison, etc., Ry. Co. (Kan.), 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222, 87 Pac. 751; Pecos N. T. Ry. Co. *v.* Evans-Snyder-Buel Co. (Tex.), 24 R. R. R. 458, 47 Am. & Eng. R. Cas., N. S., 458, 97 S. W. 466.

Delay in Furnishing Cars—Injuries to Cattle.—Injuries to cattle sustained by reason of the carrier's delay in furnishing cars for shipment are not covered by a stipulation in the bill of lading that, "as a condition precedent to a recovery of any damages for any loss or injury to stock covered by this contract," the shipper will give notice to the railroad before the stock is removed. So held in St. Louis, etc., Ry. Co. *v.* Law, 68 Ark. 218.

Failure of Express Office to Promptly Forward Goods.—A stipula-

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tion in the receipt given by an express company for goods to be transported, "that the company shall not be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office within thirty days after this date," is not applicable where the claim is on account of negligence by the express office which issued the receipt in not promptly forwarding the goods. So held in Baltimore & Ohio Express Co. *v.* Cooper, 66 Miss. 558, 6 So. 327, 40 Am. & Eng. R. Cas. 97.

Delay in Furnishing Cars.—A stipulation of a bill of lading that claim for loss of or damage to freight must be made within forty days does not apply to damages from delay in furnishing cars for transportation of the freight. So held in Gulf, C. & S. F. Ry. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

Statutory Penal Action for Failure to Feed and Water.—A statutory penal action against a carrier for failure to feed and water live stock in transit is not affected by a stipulation of the shipping contract that any suit for damages to the stock must be brought within forty days after the damage occurred. So held in Gulf, etc., Ry. Co. *v.* Gray (Tex. Civ. App.), 24 S. W. 837.

Transmission and Collection of Draft by Express Company—Company's Failure or Refusal to Pay.—A stipulation, annexed to a receipt given by an express company upon receiving a draft for transmission and collection, that it should not be liable for any loss or damage unless a claim should be asserted within 90 days, was inapplicable to limit the company's liability for neglect or refusal to pay the plaintiffs the money received for them. So held in Bardwell *v.* American Express Company, 35 Minn. 344, 28 N. W. 925.

Breach of Contract—Shipping by Freight, Instead of Passenger, Service—Injury to Stock—Notice in Five Days.—But in Pavitt *v.* Lehigh Valley R. R., 153 Pa. 302, 25 Atl. 1107, it is held that, although a railroad company deviates from a contract to transport live stock by shipping it by freight service instead of by passenger service, as agreed upon, and the stock is injured by the delay and rougher service, such deviation does not relieve the shipper from giving the carrier notice of his claim for damages within five days, in accordance with a stipulation of the contract.

Nondelivery—Liability of Express Company Not Limited.—A stipulation in a shipping contract that "it (the express company) is not to be held liable for any loss or damage whatever, unless claim be made therefor within ninety days from the delivery to it," is to be construed, in an action upon the contract for the nondelivery of freight, not to limit the liability of the express company. So held in Porter *v.* Southern Express Co., 4 S. Car. 135.

Loss from Fraud or Gross Negligence—Simple Negligence.—And, while a stipulation of a shipping contract that any claim for loss or damage must be presented within thirty days from the accruing of the cause of action, does not apply where the loss or damage was occasioned by the fraud or gross negligence of the carrier or its employees, it may apply, by virtue of an express provision of the contract, to claims for loss or damage arising with absence of ordinary care, as the presentation of the claim within the time and in the manner specified is not a condition precedent to the right of action. So held in Westcott & Northrup *v.* Fargo (N. Y.), 63 Barb. 349.

E. EFFECT OF STATUTORY PROHIBITION AGAINST LIMITING LIABILITY.

It has also been held that a statutory or constitutional provision declaring that the liability of a common carrier shall not be limited

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renders such a stipulation nugatory. Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Brown *v.* Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 826; Illinois Cent. R. Co. *v.* Radford (Ky.), 64 S. W. 511; Cook *v.* Chicago, etc., R. Co. (Neb.), 23 R. R. R. 606, 46 Am. & Eng. R. Cas., N. S., 606, 110 N. W. 718; Missouri Pac. R. Co. *v.* Vandeventer, 26 Neb. 222, 41 N. W. 998; Union Pac. R. Co. *v.* Thompson (Neb.), 106 N. W. 598; Gulf C. & S. F. Ry. Co. *v.* Maetze, 2 Tex. Civ. App. 553, 18 Am. & Eng. R. Cas. 613; Missouri Pac. Ry. Co. *v.* Harris, 67 Tex. 166.

Kentucky Constitution.—A stipulation in a shipping contract that no claim for loss or damage to the stock shipped shall be valid unless in writing and verified by affidavit and delivered to the carrier's agent within ten days of the time the stock is unloaded from the cars, is in violation of section 196 of the Kentucky constitution which provides that no common carrier shall be permitted to contract for relief from its common-law liability. So held in Brown *v.* Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 826.

Nebraska Constitution.—A stock shipping contract contained a provision to the effect that unless claims for loss, damage, or detention are presented within ten days from the date of unloading the stock at destination, and before the stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers shall be discharged from liability. It was held that such provision was void, under the provision of the constitution of Nebraska providing that "the liability of railroad corporations as common carriers shall not be limited. Union Pac. R. Co. *v.* Thompson (Neb.), 106 N. W. 598. See also, Missouri Pac. Ry. Co. *v.* Vandeventer, 26 Neb. 222, 41 N. W. 998; Cook *v.* Chicago, etc., R. Co. (Neb.), 23 R. R. R. 606, 46 Am. & Eng. R. Cas., N. S., 606, 110 N. W. 718.

F. NOTICE BEFORE REMOVAL OF STOCK BY CONSIGNEE.

A condition of a shipping contract requiring the consignee to give notice to the carrier of any claim he may wish to make on account of injuries to his animals before they are removed from the carrier's premises or mingled with other stock is generally held to be valid if the circumstances of the particular case do not render it unreasonable to apply the restriction.

Georgia.—Southern Ry. Co. *v.* Adams, 115 Ga. 705.

Kansas.—Goggin *v.* Kansas Pac. Ry. Co., 12 Kan. 416; Missouri, K. & T. Ry. Co. *v.* Kirkham, 63 Kan. 255, 65 Pac. 261; Sprague *v.* Missouri Pac. Ry. Co., 34 Kan. 347, 8 Pac. 465, 23 Am. & Eng. R. Cas. 684.

Kentucky.—Owen *v.* Louisville & N. R. Co., 87 Ky. 626, 9 S. W. 698.

North Carolina.—Selby *v.* Wilmington & W. R. Co., 113 N. Car. 588, 18 S. E. 88.

Texas.—Galveston, H. & S. A. Ry. Co. *v.* Harman, 2 Tex. Civ. App. Cas. 128, 136; Gulf, etc., Ry. Co. *v.* Yates (Tex. Civ. App.), 32 S. W. 355; Texas & Pac. Ry. Co. *v.* Jackson, 3 Tex. Civ. App. Cas. § 41; Texas Cent. R. Co. *v.* Morris, 1 Tex. Civ. App. Cas. § 374, 16 Am. & Eng. R. Cas. 259; Texas & Pac. Ry. Co. *v.* Scrivener, 2 Tex. Civ. App. Cas. § 330.

A contract of a railway company for the carriage of stock provided that the shipper should give notice in writing of claims for damages for injury or loss to such stock at the destination and before the removal of the stock or mingling it with other stock, and that such notice was a condition precedent to the recovery of damages for injury or loss. It was held that such provision was rea-

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sonable. Kansas, etc., Ry. Co. *v.* Ayers (Ark.), 6 Am. & Eng. R. Cas., N. S., 628.

Notice before Removal of Goods—Ship's Knowledge of Injuries.—In The Westminister (D. C.), 102 Fed. Rep. 366, it is held that a stipulation of a bill of lading that "neither the steamship owners nor their agents, nor any of their servants, are to be liable * * * for any claim notice of which is not given before the removal of the goods," imposes a reasonable and valid condition precedent to the right to maintain a suit for damages to the goods in transit, either against the owners personally or in rem, at least to the extent of requiring notice to be given within a reasonable time, and a failure to comply with such condition is not excused by the fact that the ship had knowledge of the damages. See also, The St. Hubert (C. C. A.), 107 Fed. Rep. 727.

Removal of Goods Construed to Mean Removal from Dock.—A stipulation of a bill of lading that the shipowner is not to be liable for any claim, "notice of which is not given before the removal of the goods," properly construed, does not require such notice to be given before the goods are taken from the ship, but before their removal from the dock where they are deposited by the ship, and where, after they are released from the ship's tackle, they may be inspected, by the consignees and the officers of the ship. And, so construed, the condition is reasonable and valid. So held in The St. Hubert (C. C. A.), 107 Fed. Rep. 727.

Failure to Send Copy of Contract to Consignee.—A stipulation in a contract of affreightment of live stock, requiring the owner to give notice in writing of his claim for damages to some officer of the company or its nearest station agent, before the stock is removed from the place of destination, is a reasonable stipulation and binding on the owner, and he cannot recover on failure to give such notice, though he did not go in person, or send an agent, with the stock, as in such cases he should have sent a copy of his contract to the consignees, in order that the latter might have complied with the stipulation. So held in St. Louis, etc., R. Co. *v.* Phillips (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, 87 Pac. 470.

Officers and Agents of Connecting Carrier Regarded as Those of Contracting Carrier.—Where a railroad company contracts to carry stock beyond its own terminus, and there is a stipulation in the contract, which is a condition precedent to right to recover for loss or injury, that the shipper must give written notice of his claim to an officer of such company, or its nearest station agent, before the stock is removed from the place of destination or is mingled with other stock, the officers and agents of the connecting company used and adopted by the contracting company should, for the purposes of the contract be treated as the officers and agents of the latter company, and notice given to the agent of the connecting company at the place of destination will be sufficient. So held in Wichita & W. Ry. Co. *v.* Koch, 47 Kan. 753, 28 Pac. 1013.

Failure to Give Notice of Death of Cattle Occurring after Removal.—Where, under a bill of lading requiring written notice of injury before removal, the only notice given the carrier as to the death of cattle was for certain cattle that had died before removal, the shipper could not recover for cattle that died after the removal. So held in Louisville & N. R. Co. *v.* Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96, 33 So. 482, 35 Ala. 504.

(1) Stipulation Held Unreasonable.

Where Carrier Has No Officer or Agent at Such Point.—A stipulation in a shipping contract that the owner of the stock shipped,

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as a condition precedent to his right to recover for any loss or injury to his stock, must give notice in writing of his claim to some officer of the carrier before the stock is removed from the place of its destination or delivery, is unreasonable and void, where the carrier has no officer or agent at such point. So held in Carpenter *v.* Eastern Ry. Co., 67 Minn. 188, 69 N. W. 720; Engesether *v.* Great Northern Ry. Co., 65 Minn. 168, 68 N. W. 4.

Notice before Unloading Stock.—A stipulation in a shipping contract requiring the shipper to give notice of his claim for damages before he unloads his stock from the cars is void as unreasonable. So held in Ormsby *v.* Union Pac. Ry. Co. (C. C.), 4 Fed. Rep. 706, 2 McCrary, 48.

Failure of Plea to Show That Shipper Knew Name of Station Agent at Destination.—In Galveston, H. & S. A. Ry. Co. *v.* Williams (Tex. Civ. App.), 25 S. W. 1019, it appeared that the contract for the transportation of plaintiff's stock required the shipper to give written notice of any claim for damage, before the stock was mingled with other stock, to "———, station agent of said" carrier at A. station, or, if he were not at such office, to such servant of the carrier at such station as represented it at the actual delivery. This contract was set up by a special plea which alleged that plaintiff never made any such demand within ninety days after receipt of the stock, and that the carrier had and has at A. an agent named. It was held that a reasonable condition was not alleged, because the plea failed to show that the shipper knew the name of the station agent, or that the carrier had a station agent, or any servant representing it, at the delivery of the stock at its destination.

Stock Shipped beyond Terminus of Initial Railroad—Absence of Agent or Officer.—In Baxter *v.* Louisville, etc., Ry. Co. (Ill.), 7 Am. & Eng. R. Cas., N. S., 618, it appeared that stock was shipped over a railway to a point several hundred miles beyond the terminus of such railway, and the railway company had no agent or officer at or near such point. The contract of shipment limited such company's liability to damages arising on its own line. The contract provided that as a condition precedent to recovery of damages for loss of or injury to such stock that the shipper should give notice to some officer of the company or to its nearest agent before the animals were removed from the station at their destination, and before they were mingled with other stock. It was held that such provision was unreasonable and void.

Failure of Contract to Give Names of Agents at Places of Shipment and Destination.—A shipping contract stipulated that, as a condition precedent to a right to recover damages for injuries to the stock shipped, notice of the claim for damages should be given to an agent of the carrier before the stock was removed from the pens at the place of delivery, but the contract failed to give the names of the agents at the places of shipment and destination. It was held that the contract was unreasonable because of such failure. Galveston, H. & S. A. Ry. Co. *v.* Short (Tex. Civ. App.), 25 S. W. 142.

(2) Stipulation Not Applicable.

Refusal of Owner to Receive Injured Horse—Allowed by Carrier to Run on Common at Destination.—Stock was shipped to D. by defendant railroad, upon a special contract, and one of the animals was injured in transit. It was taken from the cars at D. in the presence of the carrier's station agent who saw its injured condition. The owner refused to receive it and it was allowed to run on the commons at D. The shipping contract provided that as a condition precedent to a right to recover for such an injury the shipper should

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give notice in writing to the agent of the carrier of his claim for damages "before said stock is removed from the place of destination and before such stock is mingled with other stock." It was held that the condition as to notice was not applicable as there was no removal of the injured animal, and no mingling of it with other stock, within such stipulation. So held in Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017.

Refusal to Receive Worthless Freight.—In Gulf, C. & S. F. Ry. Co. *v.* Golding, 3 Tex. App. Cas. § 33, 23 Am. & Eng. R. Cas. 732, it appeared that the shipping contract stipulated that the extent of the damage to the freight should be adjusted in the presence of an officer of the railroad before it was removed from the station. It was held that the stipulation was not applicable because there was no delivery of the freight, the owner having rightfully refused to receive it because it was so injured as to be worthless.

Removal from Destination by Carrier.—A provision in a shipping contract that the shipper shall give notice of any claim for damages before the freight is removed from the place of delivery, does not apply to a removal by the carrier. So held in Baker *v.* Missouri Pac. Ry. Co., 34 Mo. App. 98.

G. MUST BE REASONABLE.

Of course, such a condition of a shipping contract will not be applied when the peculiar circumstances of the case would render it unreasonable and oppressive to do so.

United States.—Central Vt. R. Co. *v.* Soper (C. C. A.), 59 Fed. Rep. 879; Ormsby *v.* Union Pac. Ry. Co. (C. C.), 4 Fed. Rep. 706, 2 McCrary, 48; Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co. (C. C. A.), 94 Fed. Rep. 180.

Alabama.—Southern Express Co. *v.* Bank of Tupelo, 108 Ala. 517, 18 So. 664; Southern Express Co. *v.* Caperton, 44 Ala. 101.

Arkansas.—St. Louis, etc., Ry. Co. *v.* Law, 68 Ark. 218.

Illinois.—Baxter *v.* Louisville, etc., Ry. Co. (Ill.), 7 Am. & Eng. R. Cas., N. S., 618.

Indiana.—Adams Express Co. *v.* Reagan, 29 Ind. 21; Cleveland, etc., R. Co. *v.* Potts & Co., 33 Ind. App. 564.

Massachusetts.—Cox *v.* Central Vt. R. R., 170 Mass. 129, 49 N. E. 97.

Minnesota.—Carpenter *v.* Eastern Ry. Co., 67 Minn. 188, 69 N. W. 720; Bardwell *v.* American Express Co., 35 Minn. 344, 28 N. W. 925.

Missouri.—Dunn *v.* Hannibal & St. J. R. Co., 68 Mo. 268; Popha *v.* Barnard, 77 Mo. App. 619.

New York.—Bruning *v.* Long Island R. Co., 2 Daly (N. Y. Com. Pl.), 117.

North Carolina.—Capehart *v.* Seaboard & R. R. Co., 81 N. Car. 438; Cigar Co. *v.* Southern Express Co., 120 N. Car. 348, 27 N. E. 73.

Tennessee.—Smitha *v.* Louisville & N. R. Co., 86 Tenn. 198, 6 S. W. 209.

Texas.—Good *v.* Galveston, H. & S. A. Ry. Co. (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98; Galveston, H. & S. A. Ry. Co. *v.* Boothe, 3 Tex. Civ. App. Cas. 364; Gulf, etc., Ry. Co. *v.* Elliott (Tex. Civ. App.), 26 S. W. 636; Gulf, C. & S. F. Ry. Co. *v.* Hume (Tex. Civ. App.), 24 S. W. 915; Gulf, etc., Ry. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567; Gulf, etc., Ry. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480; Missouri Pac. Ry. Co. *v.* Childers (Tex. Civ. App.), 29 S. W. 559; Missouri Pac. Ry. Co. *v.* Cornwall, 70 Tex. 611; Missouri Pac. Ry. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574; Houston & T. C. R. Co. *v.* Davis (Tex. Civ. App.), 31 S. W. 308.

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Virginia.—Norfolk, etc., R. Co. *v.* Reeves & McNeil, 97 Va. 284, 33 S. E. 606.

Object of Provision—Protection of Carrier against Unjust Claims.—In Hinkle *v.* Southern Ry. Co., 126 N. Car. 932, it is held that the failure of a shipper to give the carrier formal written notice of loss of or injury to the freight, as required by the contract of affreightment, will not prevent him from recovering, if otherwise entitled, as the object of such a provision is not to relieve the carrier from just liability, but to enable the latter, by proper investigation, to protect itself against unjust claims.

The manifest object of a provision of a contract of shipment limiting the time for presenting claims for damages to freight is to compel those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of the parties and witnesses and to prevent the carrier from being harassed or imposed upon by dishonest claimants. Baltimore & Ohio S. W. R. Co. *v.* Fox, 105 Ill. App. 54.

Harmless Breach of Condition.—A failure to comply with a provision of the bill of lading requiring, as a condition precedent to the carrier's liability for loss or damage, that notice of claims for injuries to the freight be given within a certain period, is no defense, if the carrier was not harmed by such failure. So held in Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas., N. S., 30.

Where Transportation May Consume Entire Period.—A condition in a bill of lading which requires a written claim for loss or damage to be made within thirty days after the loss or damage occurs, where the transportation may reasonably consume the whole thirty days, is invalid as unreasonable. So held in Cent. Vt. R. Co. *v.* Soper (C. C. A.), 59 Fed. Rep. 879.

Claim against Steamship Company—Thirty Days from Date of Bill of Lading.—A stipulation in a bill of lading requiring all claims against the carrier steamship company for damages to be presented within thirty days from the date thereof is void as unreasonable. So held in Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co. (C. C. A.), 94 Fed. Rep. 180.

Loss of Money—Thirty-Two Days from Date of Bill of Lading.—A condition in a bill of lading that "in no event should the defendant be liable for any loss unless a claim therefor should be made in writing at the office of defendant where the money is alleged to have been shipped from, within thirty-two days from the date of said contract," is unreasonable, tends to fraud, and is void. So held in Southern Express Co. *v.* Bank of Tupelo, 108 Ala. 517, 18 So. 664.

Loss of Express Package—Thirty Days from Date of Receipt.—A stipulation in a receipt given by a common carrier, that it should not be liable for loss of a package of money unless a claim for the loss was made within thirty days from the date of the receipt is unreasonable, tends to fraud, and is invalid. So held in Southern Express Co. *v.* Caperton, 44 Ala. 101.

Thirty Days from Date of Shipment.—In Dunn *v.* Hannibal & St. J. R. Co., 68 Mo. 268, it appeared that a shipping contract provided that "claims for loss or damages must be presented in thirty days from date of shipment" in order to receive attention. It was held that such provision was void, its language being too vague to be allowed effect.

Claim against Express Company—Thirty Days from Date of Bill of Lading—Undelivered Packages Not Returned until after Thirty Days.—In Cigar Co. *v.* Southern Express Co., 120 N. Car. 348, 27

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S. E. 73, it is held that where an express company's bill of lading contained a condition that the company should not be liable for loss or damage, unless claim therefor should be made within thirty days from the date of the bill of lading, and the carrier instructed its agents not to return undelivered packages until the expiration of thirty days from their arrival at their destination, such stipulation is invalid for unreasonableness.

Thirty Days after Due Time for Delivery.—A stipulation in a bill of lading that notice of loss or damage to freight must be given in writing to a carrier within thirty days after delivery thereof, or after due time for such delivery, is invalid as unreasonable. So held in Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co. (N. Car.), 38 S. E. 894. 21 Am. & Eng. R. Cas., N. S., 429.

Sixty Days of Date of Contract—Absence of Reference to Time of Loss.—In Pacific Express Co. *v.* Darnell (Tex.), 6 S. W. 765, 32 Am. & Eng. R. Cas. 543, it appeared that machinery was delivered to an express company in Texas for shipment to Baltimore; that the shipping contract stipulated that "the said company should not be held liable for any claim arising from the contract unless it be presented within 60 days of the date of the contract." It was held that such stipulation, having no reference to the time of loss, was invalid as unreasonable.

Grain in Elevator Held Subject to Order for Shipment.—A stipulation in a bill of lading, under which grain is transported from Chicago to Ogdensburg, and there unloaded into an elevator and held subject to order for shipment by rail to various parts of New England, that the carrier shall not "be liable in any case or event unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days," is invalid as unreasonable. So held in Cox *v.* Central Vt. R. R., 170 Mass. 129, 49 N. E. 97.

Bill of Lading Blank as to Name and Location of Agent.—A provision of a bill of lading requiring the shipper to give notice to the freight agent of the carrier of any claim for damage to the stock, within five days after its arrival at its destination, will be held waived where the bill of lading is blank as to the name and location of such agent, and the location of his office, and they are unknown to the shipper. So held in Norfolk, etc., R. Co. *v.* Reeves & McNeil, 97 Va. 284, 33 S. E. 606.

Notice on Reshipment.—In Gulf, etc., Ry. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480, it is held that a stipulation that the shipper must give notice of his claim for damages on reshipment of the freight was void as unreasonable.

Thirty-Six Hours after Delivery—Shipments beyond Railroad's Terminus—Nature of Property and Claim.—In Jennings *v.* Grand Trunk Ry., 127 N. Y. 438, 28 N. E. 394, it is held that a stipulation of a bill of lading that no claim for loss or delay shall be allowed unless notice in writing and particulars of the claim be "given to station freight agent at or nearest to the place of delivery within thirty-six hours after the goods, in respect to which said claim is made, are delivered," was applicable to shipments beyond the terminus of defendant's railway; but that in view of the nature of the property and the claim for damages, the time specified was unreasonable, and, therefore, the stipulation was invalid.

Loss of Article—Thirty Days—Adjustment before Removal from Station.—A condition in a contract of affreightment that claim for the loss of any article shipped, while in transit or before delivery, shall be given within thirty days to a trace agent of the carrier, and that the extent of the damage or loss shall be adjusted before removal of

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the freight from the station, is void as an unreasonable stipulation. So held in Capehart *v.* Seaboard & R. R. Co., 81 N. Car. 438.

During Civil War—Transportation Interrupted.—Where a package was shipped from Clayton, Indiana, to Savannah, Georgia, during the civil war, when transportation was interrupted, it was held that a stipulation that the carrier should not be liable for any loss, unless a claim therefor was presented within thirty days after the shipment at Clayton, was unreasonable and void. Adams Express Co. *v.* Reagan, 29 Ind. 21.

Injured Animal Removed by Carrier's Employees to Distant Point and Killed.—A provision of a shipping contract requiring the shipper to give notice in writing of his claim, within five days after loss or damage is sustained, does not apply where the carrier's employees removed the injured animal to a distant point and killed him. Richardson *v.* Chicago & A. R. Co., 62 Mo. App. 1.

H. REASONABLENESS OF STIPULATION—QUESTION FOR JURY.

The question of the reasonableness of the time within which a claim for loss of or damage to freight must, under the contract requirement, be made, is generally one for the determination of the jury. Western Ry. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781; Coles & Co. *v.* Louisville, E. & St. L. R. Co., 41 Ill. App. 607; Texas & Pac. Ry. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666; Texas & P. Ry. Co. *v.* Barber (Tex. App.), 30 S. W. 500; Missouri, K. & T. Ry. Co. *v* Leibold (Tex. Civ. App.), 55 S. W. 368.

Thirty-Six Hours after Delivery—Question for Jury.—In Texas & Pac. Ry. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, it is held that it is a question for the jury whether a rule of the carrier, requiring notice of damage to freight to be given at the place of delivery within thirty-six hours after its delivery by the carrier, was reasonable.

I. NOTICE MAY BE GIVEN AFTER EXTENT OF DAMAGES IS ASCERTAINED.

So, where the damage to the freight, or its nature and extent, could not be discovered or ascertained by the consignee, by the exercise of due care, until after the expiration of the time limited by the contract for giving notice of claims for injuries to the shipment, the stipulation will not protect the carrier if the claim is made within a reasonable time after the loss or injury is ascertained..

United States.—Ormsby *v.* Union Pac. Ry. Co., 4 Fed. Rep. 706, 2 McCrary (U. S. Cir. Ct.), 48.

Alabama.—Louisville & N. R. Co. *v.* Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96, 33 So. 482, 135 Ala. 504; Western Ry. Co. *v.* Harwell, 97 Ala. 341, 343, 11 So. 781.

Arkansas.—St. Louis, etc., Ry. Co. *v.* Hurst, 67 Ark. 407, 55 S. W. 215.

Indiana.—Louisville, etc., Ry. Co. *v.* Steele, 6 Ind. App. 183.

Kansas.—Atchison, etc., R. Co. *v.* Temple, 47 Kan. 7, 27 Pac. 98.

Mississippi.—Southern Express Co. *v.* Stevenson (Miss.), 23 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

Missouri.—Harned *v.* Missouri Pac. Ry. Co., 51 Mo. App. 482; Popha *v.* Barnard, 77 Mo. App. 619; Richardson *v.* Chicago & A. R. Co., 62 Mo. App. 1.

Ohio.—Baltimore & O. R. Co. *v.* Hubbard, 72 Ohio St. 302, 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71, 74 N. E. 214.

Tennessee.—Memphis & C. R. Co. *v.* Holloway & Tatum, 68 Tenn. 188.

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Texas.—Houston & T. C. R. Co. *v.* Davis (Tex. Civ. App.), 31 S. W. 308.

Condition of Stock Made Known to Station Agent—Opportunity to Inspect—Consent to Removal—Notice of Claim Sent to Claim Agent within Four Days after Removal.—In Atchison, etc., R. Co. *v.* Temple, 47 Kan. 7, 27 Pac. 98, it appeared that a shipping contract provided that, as a condition precedent to the shipper's right to recover damages for any loss or injury to his stock, he should give notice in writing to some officer of the carrier, or its nearest station agent, before the removal of the stock from the place of delivery. It appeared also that the condition of the stock was made known to the station agent at the place of destination, and he consented to the removal of the stock from the car, and had an opportunity to inspect the animals after such removal and before they were mingled with other stock or been removed from the place of destination; and a written notice for damages was transmitted to the claim agent of the railroad within four days after the removal of the stock from the car, and ten days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company. It was held that there had been a substantial compliance with the contract by the shipper.

Reasonable Time for Giving Notice—Definition.—Reasonable time within which the shipper is required to give notice to the express company of his claim, is such as would be ample to ascertain the non-delivery of the parcel at the place of destination, depending on the distance and facilities of communication. So held in Southern Express Co. *v.* Hunnicutt, 54 Miss. 566.

Right to Give Additional Notice.—That an owner to whom a bill of lading has been issued gives written notice of injury to certain cattle before their removal does not preclude him from the right of giving additional notice of other injuries within a reasonable time after their discovery. So held in Louisville & N. R. Co. *v.* Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96, 33 So. 482, 135 Ala. 504.

Damaged Packages.—A condition in a bill of lading that the initial carrier shall not be liable for loss or damage to freight unless notice thereof is given to the delivering carrier within thirty hours after delivery is not unreasonable, as regards packages which may have been entirely lost; and as to damaged packages, its reasonableness will depend upon whether sufficient time was given to discover the damage and report the loss. So held in St. Louis, etc., Ry. Co. *v.* Hurst, 67 Ark. 407, 55 S. W. 215.

At Time of Delivery.—A stipulation in a shipping contract that a claim for loss of freight must be made at the time the goods are delivered by the carrier, will not protect a railroad, where the claim is made within a reasonable time after the loss is ascertained. So held in Memphis & C. R. Co. *v.* Holloway & Tatum, 68 Tenn. 188.

Within Five Days after Delivery—Notice and Extent of Loss Not Ascertained in Time—Carrier's Knowledge of Injury.—Where a shipping contract stipulates that verified notice of loss or damage shall be given the carrier within five days after the freight reaches the place of delivery, and the consignor does not learn of the nature and extent of the loss for more than a month after the same occurred, the application of the rule is unreasonable, and especially where the carrier is as well informed as to the damage as the shipper. So held in Popha *v.* Barnard, 77 Mo. App. 619.

Injuries to Cattle Discovered after Their Removal.—Where a bill of lading for a shipment of cattle provides that the shipper, as a

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prerequisite to any right to recover for injury to the cattle, shall, before removal of the cattle from the place of delivery, and before their mingling with other cattle, give written notice of any damages, the requirement is complied with where the shipper does not discover the injuries, and could not have done so, before removal, but gives notice thereof within a reasonably short time after discovery of the injury. Louisville & N. R. Co. *v.* Landers (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96, 33 So. Rep. 482, 135 Ala. 504.

A stipulation in a contract for the carriage of live stock, that as a condition to a recovery for injury to the stock at any place where the same might be loaded or unloaded for any purpose notice in writing should be given to the station-master specifying the nature of the claim, etc., before the removal of the stock from the station, is unreasonable, when it appears that although before reloading the shipper knew that his cattle had been crowded in pens and had suffered for the want of food and water, yet he did not know the extent of his damages, and, at most, could have made only a vague complaint. So held in Gulf, etc., R. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480.

Horses Injured by Burning of Their Car.—A provision in a shipping contract requiring notice of any claim for damages to be given before the removal of the freight from the station, is, when applied to injuries to horses caused by the burning of the car in which they were shipped, prima facie unreasonable, as it is not probable that the full amount of the damage to the horses would be immediately disclosed. So held in Houston & T. C. R. Co. *v.* Davis (Tex. Civ. App.), 31 S. W. 308.

Survival of Horse in Doubt.—In Baltimore & O. R. Co. *v.* Hubbard, 72 Ohio St. 302, 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71, 74 N. E. 214, the stipulation requiring notice of claim for injury to plaintiffs' horse to be given the carrier within a certain time was not reasonable, if applied to the claim in question, as the owners of the horse were entitled to time sufficient to enable them to know whether the claim should be for injury to a live horse, or for the value of a dead one.

One Day after Delivery of Calf—Nature and Extent Not Immediately Discoverable.—In Harned *v.* Missouri Pac. Ry. Co., 51 Mo. App. 482, it appeared that a calf was shipped under a contract requiring service of notice of loss within one day after delivery, and the injuries sued for were such as to take time to ascertain their nature and extent, and when ascertained notice was given and claim for damages made. It was held that was sufficient compliance with such requirement.

Injury to Poultry from Delay before Removal or Mingling with Other Stock.—In Louisville, etc., Ry. Co. *v.* Steele, 6 Ind. App. 183, an action to recover for breach of a contract for the delivery of a car load of poultry at, "team track," Chicago, it appeared that the car, when it arrived at 51st street, Chicago, was delayed at that point about nine hours, such delay causing the poultry to greatly shrink in weight before it could be got to market. The contract stipulated that notice should be given in writing of any claim for damages to some officer of the company or its nearest station agent, before the stock was removed from the place of delivery, and before it was mingled with other stock. The only testimony as to notice of loss was by the shipper, which was to the effect that he notified the carrier by letter, about two weeks after the loss, as soon as he had ascertained the amount thereof. It was held that the evidence as to notice was sufficient to withstand a demurrer, and that the

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notice, under the circumstances, was a sufficient compliance with the requirement of the contract.

Extent of Illness of Horses Not Discoverable before Removal.—In Ormsby *v.* Union Pac. Ry. Co., 4 Fed. Rep. 706, 2 McCrary (U. S. Cir. Ct.) 48, it appeared that a contract between a railroad company and a shipper of horses stipulated that for injuries to the animals shipped over the railroad the owner should make a demand in writing of the agent of the carrier before removing them from the place of destination or from the place of delivery. It was held that this stipulation did not apply where the injury was the illness of the animals, and the extent of the illness could not be known until their removal from the cars, and probably not for some time after their removal.

J. NON-COMPLIANCE CAUSED BY CONDUCT OF CARRIER OR ITS AGENT.

Such a restriction of the carrier's liability will not be applied where failure to give the required notice was caused by the conduct of the carrier or that of its agent or servant. Cleveland, etc., R. Co. *v.* Potts & Co., 33 Ind. App. 564; Owen *v.* Louisville & N. R. Co., 87 Ky. 626, 9 S. W. 698; Soper *v.* Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853; Illinois Cent. R. Co. *v.* Bogard, 78 Miss. 11, 18 Am. & Eng. R. Cas., N. S., 410; Southern Express Co. *v.* Stevenson (Miss.), 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670; Richardson *v.* Chicago & A. R. Co. (Mo.), 13 Am. & Eng. R. Cas., N. S., 170, 149 Mo. 311, 50 S. W. 782; Atchison, etc., Ry. Co. *v.* Grant, 6 Tex. Civ. App. Rep. 674, 26 S. W. 287; Reynolds *v.* Great Northern Ry. Co. (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70, 82 Pac. 161.

Freight Which Has Never Arrived at Destination.—When a railroad company seeks to defeat its common-law liability as a common carrier by invoking a special contract, it must show a violation of both the spirit and letter of such contract, therefore, where the freight for the loss of which damage is claimed has never arrived at its destination, written notice of the claim provided for by the shipping contract is not required. So held in Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas. 30.

Freight Billed to Wrong Party by Carrier without Authority—Goods Lost.—In Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 2 Ind. App. 600, 59 N. E. 43, it is held that failure to give notice of loss as required by the bill of lading, will not preclude a right of action for the loss, where the loss resulted from the initial carrier billing the goods direct to a party other than the consignee, whereby the goods were lost to plaintiff, since the carrier lost the benefit of the exceptions from liability by billing the freight to a party other than the consignee without authority to do so. See also, Cleveland, etc., R. Co. *v.* Potts & Co., 33 Ind. App. 564.

Oral Notice Given in Time—Tracer Sent Out by Express Agent.—A receipt given by an express company provided that it should not be liable for loss unless the claim should be presented in writing within 30 days. Within a few days after the delivery of the package verbal notice was given the agent at the shipping point of a partial loss, and the agent sent out a tracer. After about ninety days the agent reported that he was unable to find the property, and immediately thereafter a written demand was made on the company for the value of the property lost. It was held that the notice was sufficient. Southern Express Co. *v.* Stevenson (Miss.), 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

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Injured Animal in Charge of Carrier's Employees.—In Richardson *v.* Chicago & A. R. Co., 149 Mo. 311, 50 S. W. 782, 13 Am. & Eng. R. Cas., N. S., 170, it appeared that a shipping contract provided that the owner of stock in case of injury or loss in shipment should notify the railroad company within five days "after said loss or damage has occurred;" that after the injury complained of the injured animal was in charge of the carrier's employees, and the delay in giving the notice was caused by their conduct; and that when the shipper learned of the loss he promptly notified the carrier. It was held that it would be unreasonable to require that such owner should have given the notice sooner than he did, or to deny him the right to recover simply because no notice was actually given within the five days.

Freight Refused by Consignee—Failure of Carrier to Return It According to Promise—Stipulation of Original Contract Not Applicable.—When freight, forwarded by the owner by express, is refused by the consignee, and the express company promises to return it to the shipper, but negligently fails to do so, the damages the shipper is entitled to recover against the carrier is based upon the contract for the return of the goods, and not upon the original shipping contract, and is, therefore, not affected by a provision in the latter contract requiring claims arising under it to be made in writing within sixty days of its date. So held in Green *v.* Pacific Express Co., 37 Mo. App. 537.

Contract to Carry Parcels, and Collect Values from Consignees or Return to Shipper—Carrier's Breach of Contract.—In Smith *v.* Dinsmore, 6 Daly (N. Y. Com. Pl.), 188, it appeared that an express company undertook to carry for plaintiff certain parcels, and also to collect from the consignees upon delivery to them the sums endorsed upon the bills of lading, each of which was marked C. O. D. The bills of lading stipulated that "in no event should the Adams Express Company" (the defendants) "be liable for any loss or damage unless the claim therefor should be presented to them in writing at their office within 30 days after the date of the bill of lading in a statement to which the receipt given to the shipper should be annexed," and a further stipulation in these words: "If any sum of money besides the charge for transportation is to be collected from the consignee on delivery of the above described property, and the same is not paid within 30 days from the date of the bill of lading, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charge for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection shall be that of warehousemen only." The carrier failed to collect the amounts due on the parcels, and did not return them to the plaintiff. It was held that plaintiff was not restricted to thirty days, but was entitled to a reasonable time in which to present his claim against the express company for its default.

Delay Caused by Shipper Being Directed to See Other Agents.—A contract of shipment of live stock stipulated that a claim for damages unless presented within ten days from the date of unloading, at destination, should be waived. The shipper, on the day after unloading, informed the carrier's agent at that point that he wanted to put in a claim for damages. The agent told the shipper to see another agent on paying the freight. The shipper did so, and that agent told him to see another agent. The shipper within ten days made an oral claim to the latter agent, who requested a written statement, which was furnished after the expiration of the ten days.

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It was held that the claim for damages was made within the time specified. Reynolds *v.* Great Northern Ry. Co. (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70, 82 Pac. 161.

Stipulation Expressly Waived by Agent—Verbal Notice Sufficient.—Where a stipulation of a shipping contract that a written notice of a claim for damages must be made in writing to the carrier's agent at the place of delivery is expressly waived by such agent, a verbal notice is sufficient upon which to base a claim for damages. So held in Atchison, etc., Ry. Co. *v.* Grant, 6 Tex. Civ. App. Rep. 674, 26 S. W. 286.

Agents without Authority to Waive—Effect of Contract Provision.—But where, in a special contract for the shipment of cattle, the shipper expressly agrees, as a condition precedent to his right of recovery for damages growing out of such shipment, that "he will give notice in writing to the conductor in charge of the train, or the nearest station or freight agent of the carrier on whose line the injuries occur before said cars leave the carrier's line, or before the cattle are mingled with other cattle or removed from pens at destination," the stipulation for such written notice, fairly entered into by both parties, is reasonable, and binding upon the parties, and where it is further provided in such contract that "no agent of this company has any authority to waive, modify, or amend any of the provisions of this contract," it is error to instruct the jury that notice different from that provided in the contract is sufficient, based upon the waiver of such written notice by the acts or knowledge of the agent of the company. So held in Missouri, K. & T. Ry. Co. *v.* Kirkman (Kan.), 21 Am. & Eng. R. Cas., N. S., 845, 65 Pac. 261.

K. WAIVER OF COMPLIANCE WITH STIPULATION—INCONSISTENT CONDUCT OF CARRIER.

Compliance with a provision of the shipping contract requiring notice of claims for loss of or injury to be given within a fixed time may be waived and rendered inapplicable by conduct of the carrier inconsistent with the existence of an intention to claim the protection of the stipulation.

Arkansas.—St. Louis, etc., Ry. Co. *v.* Jacobs (Ark.), 4 R. R. R. 314, 27 Am. & Eng. R. Cas., N. S., 314, 68 S. W. 248.

Illinois.—Chicago & A. R. R. Co. *v.* Grimes, 71 Ill. App. 397; Wabash Ry. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273.

Kentucky.—Owen *v.* Louisville & N. R. Co., 87 Ky. 626, 9 S. W. 698.

Michigan.—Soper *v.* Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853; Wallace *v.* Lake Shore, etc., R. Co., 133 Mich. 634.

Mississippi.—Illinois Cent. R. Co. *v.* Bogard, 78 Miss. 11, 18 Am. & Eng. R. Cas., N. S., 410.

Missouri.—Harned *v.* Missouri Pac. Ry. Co., 51 Mo. App. 482; Hess *v.* Missouri Pac. Ry. Co., 40 Mo. App. 202; Rice *v.* Kansas Pac. Ry., 63 Mo. 314.

North Carolina.—United States Watch Case Co. *v.* Southern Express Co., 120 N. Car. 351, 27 S. E. 74.

Oregon.—Bennett *v.* Northern Pac. Express Co., 12 Ore. 49, 6 Pac. 160.

Pennsylvania.—Eckert *v.* Pennsylvania Co. (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475, 60 Atl. 781.

Texas.—Galveston, H. & S. A. Ry. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; International & G. N. Ry. Co. *v.* Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

Acting on Verbal Notice.—Provision in a contract of shipment that

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the shipper give immediate written notice of injury is waived by the proper agents of the carrier acting on verbal notice, and making all investigation desired without demanding written notice. So held in St. Louis, etc., Ry. Co. *v.* Jacobs (Ark.), 4 R. R. R. 314, 27 Am. & Eng. R. Cas., N. S., 314, 68 S. W. 248.

Promise to Settle Claim on Merits.—In Harned *v.* Missouri Pac. Ry. Co., 51 Mo. App. 482, it appeared that compliance with such a condition of the shipping contract was waived by the carrier's agent admitting the possession of the notice sent by the shipper and promising to settle the claim on its merits.

Failure of Vendee to Pay for Goods—Carrier's Promise to Return to Vendor—Wrongful Delivery to Vendee.—In Marcus *v.* New Haven Steamboat Co. (N. Y. Sup. Ct.), 20 Misc. Rep. 421, it appeared that the vendor of goods, consigned by himself to himself at a distant point, after learning that the vendee had failed to pay for them on delivery, as agreed, demanded them of the carrier on the thirtieth day after they were forwarded, and was then informed by its agent that it had the goods and would return them to the vendor within a few days. It was held that the carrier could not escape liability for a conceded misdelivery to the vendee, made without any payment or the presentation of the bill of lading, by setting up the conceded failure of the vendor to comply with a clause in the bill of lading which protected the carrier from liability for loss or damage, unless claim was made therefor within thirty days after the delivery of the property or after due time for its delivery.

Failure to Require Compliance.—A stipulation in an express receipt that the company shall not be liable for loss or damage unless the claim therefor shall be presented in writing within ninety days after date of the receipt, is waived by the express company in not requiring compliance with the stipulation. So held in Bennett *v.* Northern Pac. Express Co., 12 Ore. 49, 6 Pac. 160.

Claim, Filed too Late, Returned to Have Freight Bill Attached.—The bill of lading provided that no claim for damages to the stock shipped should be made unless filed within five days. The claim in question was filed one day late, but was returned to plaintiff to have the freight bill attached, which was done, and then the carrier declined to settle on the ground that the claim was filed too late. It was held that such provision as to time was waived. Wallace *v.* Lake Shore, etc., R. Co., 133 Mich. 634.

Verbal Notice to Station Agent within Contract Period—Conditional Promise of Claim Agent and His Request for Documents.—It was stipulated in a bill of lading that claims for damages must be made in writing, and, if delayed for more than thirty days after delivery of the freight, the carrier should not be liable. The station agent was verbally notified within the time specified, and he notified the carrier, and, after the expiration of that time, the freight claim agent, on having his attention called to the matter, informed the claimant by mail that he could find no record of the claim, and asked for certain papers in case a "regular" claim had not been presented, and expressed the company's willingness to make a prompt adjustment if it should be found liable. It was held that such condition of the bill of lading was waived. Falkenberg *v.* Erie R. Co. (N. Y. Sup. Ct.), 28 Misc. Rep. 165, 59 N. Y. Supp. 44.

Carrier Informed of Injury by Letter—Request for Further Information.—In Nelson *v.* Great Northern Ry. Co., 28 Mont. 297, it appeared that a contract of affreightment stipulated that in case of loss or damage the shipper must give notice in writing of his claim, as a condition precedent to a right to recover; that the carrier received information of the injury to the freight by letter, and called for in-

formation regarding the same shortly after the shipment was made. This was held a sufficient notice when not objected to.

Unverified Claim Received—Promise to Give Prompt Attention as Soon as Discrepancies Were Explained.—Evidence that a carrier received an unverified claim for damages from a shipper of stock, with a promise to give the matter prompt attention as soon as certain discrepancies were explained, and without any other objection than as to the amount of the claim, warrants the finding of a waiver of the requirement of its bill of lading that, in order to maintain a claim for damages to stock, a verified statement thereof must be served within five days after the removal of the animals from the cars. So held in Soper *v.* Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853.

Unsworn Notice—Claim Treated as Pending for Adjustment.—A carrier may waive a stipulation in a shipping contract that claim for damages must be made in writing, in five days, and be verified by affidavit, by receiving, without objection, unsworn notice, and treating the claim as pending for adjustment upon its merits. So held in Wabash Ry. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273.

Verbal Notice—Claim Treated as Pending.—A railroad company may waive a stipulation in a shipping contract, that claims for damages must be made in writing, by receiving a verbal notice without objection and treating the claim as pending. So held in Chicago & A. R. R. Co. *v.* Grimes, 71 Ill. App. 397.

Failure to Swear to Claim—Correspondence—Failure to Object.—A clause in the contract of affreightment that a claim for damages to the cattle shipped shall not be valid, unless in writing, sworn to, and delivered to the carrier's agent within 10 days after knowledge of the injury, cannot be taken advantage of by the carrier, where the agent was written to in regard to the claim, and the shipper received several letters in reply, in none of which was any question made of the claim not being sworn to. So held in Illinois Cent. R. Co. *v.* Bogard, 78 Miss. 11. 18 Am. & Eng. R. Cas., N. S., 410.

Unverified Letter Received without Objection by Freight Agent—Promise to Look up and Adjust.—In Hess *v.* Missouri Pac. Ry. Co., 40 Mo. App. 202, it appeared that a contract of affreightment provided that the shipper in case of damage to the freight in transit must, within twenty-four hours after its arrival at its destination, give notice in writing verified by affidavit to some general officer of the carrier; that the shipper within such time handed an unverified letter containing an account of his loss to defendant's freight agent, who received the same, made no objection thereto, either as to form or substance, and promised to look up and adjust the claims. It was held there was a waiver of the requirement that the notice should be sworn to.

Demand by Shipper—Pending Search—Instructions to Sell Accepted by Carrier.—Such a stipulation is waived by the carrier stating, in answer to the shipper's demand for the return of the package shipped, that the carrier was searching for it, and, when found, by its accepting the shipper's instructions to sell. So held in United States Watch Case Co. *v.* Southern Express Co., 120 N. Car. 351, 27 S. E. 74.

Examination of Freight and Agreement by Agent to Pay.—In International & G. N. Ry. Co. *v.* Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143, it appeared that a shipping contract stipulated that the carrier must be notified in writing of the extent of damage sustained by the freight in transit, before action was brought therefor; and there was evidence tending to show that compliance with this condition was waived by the carrier, through the action of its agent, after examining the freight, in agreeing to pay a certain amount in

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satisfaction of the claim. It was held that a verdict for such amount should not be disturbed.

Non-Delivery of One Barrel of Five-Barrel Shipment—Promise of Local Agent.—In Galveston, H. & S. A. Ry. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441, a suit for non-delivery of one barrel of whiskey, of a shipment of five barrels, it appeared that the bill of lading stipulated that "claims for loss or damage must be presented to the delivering line within thirty-six hours after the arrival of the freight." It was held that the stipulation did not apply because one barrel had never been delivered; and that, upon the delivery of the other four barrels, the promise of the local freight agent that it (the carrier) "would deliver this barrel in a few days" was a waiver of such notice.

Time Consumed in Tracing Freight—Subseqtuent Written Claim.—A receipt given to the shipper by an express company stipulated that the shipper must present a written claim for loss of damage to the freight shipped, within thirty days of the date of the receipt; and, he having failed to do this, such failure was urged on the trial against any recovery for non-delivery of freight. It appeared that the company consumed time in tracing the package and finally stated to plaintiff that it could not be found; and then plaintiff presented his claim. It was held that plaintiff was justified in not presenting his claim at an earlier date. Ghormley *v.* Dinsmore, 51 N. Y. Sup'r Ct. Rep. 196.

A receipt given by an express company provided that it should not be liable for loss or damage unless the claim for it should be presented in writing within thirty days. Within a few days after the delivery of the package verbal notice was given the agent at the shipping point of a partial loss, and the agent sent out a "tracer." After about ninety days the agent reported that he was unable to find the property, and immediately thereafter a written demand was made on the company for the value of the property lost. It was held the notice was sufficient. Southern Express Co. *v.* Stevenson (Miss.), 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547, 42 So. 670.

Injury to Horse and Claim Known to Agents—Surgical Examination at Carrier's Instance—Carried back to Shipping Point at Owner's Request.—In Owen *v.* Louisville & N. R. Co., 87 Ky. 626, 9 S. W. 698, it appeared that plaintiffs contracted with the defendant railroad company to carry a horse to a certain place, the contract stipulating that a written notice of claim for loss or damage should be given before the removal of the stock, etc. In removing the horse from the cars at the place of destination he was injured. The fact of the injury and plaintiff's claim for damages, was not only known to the officers and agents of the railroad, but an actual examination of the horse was made by a surgeon at the instance of defendant. In his crippled condition the horse was carried back from its destination and delivered at the same depot from which he was originally shipped. It was held that removal, although at the instance of the owner, must be regarded as by the consent of both parties, and a waiver of the notice required by the contract.

Actual Knowledge within Specified Time—Delay in Raising Question—Question for Jury.—Where a carrier of live stock had actual knowledge of injuries to them within the time limited in the contract of shipment, or notice thereof, and had not raised any question as to the want of notice until the trial, a year and a half thereafter, the question whether the carrier has waived its right to formal notice is for the jury. So held in Eckert *v.* Pennsylvania Co. (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475, 60 Atl. 781.

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Verbal Notice to Stockyard Superintendent and Train Conductor —Effect of Their Promises and Statements.—But when the shipping contract stipulated that the shipper should give notice in writing of his claim for loss of or damage to freight to some officer of the carrier, or its nearest station agent, before removing the stock from its place of delivery, and before it should be mingled with other stock, and he did not give any written notice of his claim for damages, but verbally notified the superintendent of a stockyard, and the conductor of the train on which his cattle were transported, of his claim for damages, it was held that the trial court erred in finding that a verbal notice of his claim to the parties named was a compliance with such stipulation; and that the fact that upon giving such verbal notice such persons told him to wait a reasonable time, and informed him that a member of the company would come and settle with him did not amount to a waiver on the part of the carrier of such written notice. Missouri Pac. Ry. Co. *v.* Scott, 2 Tex. Civ. App. Cas. § 321.

L. WAIVER—DENIAL OF LIABILITY ON OTHER GROUNDS.

So, the stipulation may be waived by the conduct of the carrier in denying liability for the loss or injury complained of on other grounds. Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. W. 874; Hudson & Co. *v.* Northern Pac. Ry. Co., 92 Iowa 231, 60 N. W. 608; Live Stock Co. *v.* Kansas City, etc., Ry. Co., 100 Mo. App. 674; Rice *v.* Kansas Pac. Ry., 63 Mo. 314; Merrill *v.* American Express Co., 62 N. H. 514; Patrick *v.* Farmers' Ins. Co., 43 N. H. 621.

Notice Received in Time without Objection to Sufficiency.—Where a contract of affreightment requires that, in case of loss or damage, notice thereof shall be given the carrier within a limited time, and in a particular manner, if notice of loss is given within the time limited and no objection is made to its sufficiency, but refusal to pay the claim is upon other grounds, all defects in such notice are waived. So held in Merrill *v.* American Express Co., 62 N. H. 514.

Oral Notice after Contract Period—Directed by Several Freight Agents to Make out Claim.—In Hudson & Co. *v.* Northern Pac. Ry. Co., 92 Iowa 231, 60 N. W. 608, it appeared that a shipping contract provided that claims for damages must be in writing and made within a specified time. The shipper, injured by delay of shipment, orally laid his claim before the carrier's general freight agent after such time had elapsed. And by his direction he made out a claim and left it with the claim agent. No one then objected to the failure to file the notice required by the contract. The claim agent, later, wrote, declining to pay in full, solely on the ground there was no liability, but offered to pay some extra expenditures caused by the delay. It was held that the jury were warranted in finding that the notice required by the contract was waived.

Failure to Send Telegram—Claim That Company Was Not to Blame.—The agent or manager of the company on duty at the station from which the telegraph message was sent is a proper person upon whom to make demand for the damages claimed, in compliance with a stipulation printed upon the blank which the sender of the message signs, providing that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message;" and such agent or manager is competent to recognize and act upon an oral demand and thus waive written notice. And such a waiver will result from his refusal to pay upon the sole ground that the company was not to

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blame. So held in Hill *v.* Western Union Telegraph Co., 85 Ga. 425.

Verbal Claim Received by Agent without Objection to Its Form—Consent to Removal to Consignee's Farm—Opportunity to Inspect in Time.—In Rice *v.* Kansas Pac. Ry., 63 Mo. 314, it appeared that the shipping contract in question provided that no claim for damages to the cattle shipped should be allowed unless "made in writing before or at the time the stock was unloaded;" that, while in transit, the cars were thrown from the track and some of the cattle injured; that after a considerable delay the train proceeded to its destination, where it arrived in the rain about midnight; that the consignee, before unloading, verbally notified the carrier's yardmaster and agent that he would not receive the cattle except under protest, and asserted his claim for damages without objection as to its form, and with the assurance from the agent that it was unnecessary to proceed to the company's office that night; that from the time of the accident till then, he had been compelled to give his entire attention to the care of his stock; that in consequence of the unfitness of the stockyard, and by consent of the company, the cattle were, on the night of their arrival, removed to plaintiff's farm sixteen miles distant, where their examination by the carrier was not difficult. Three days after their removal, he gave a written notice of his claim to an officer of the company, who refused to pay the same, insisting that the stock was not damaged; but he made no objection on the ground of delay in giving the notice. It was held that this showed a sufficient compliance with such provision of the contract, as it afforded the carrier an opportunity to inspect the cattle before they were mingled with other cattle, or its ascertainment of damages otherwise rendered impracticable; and that the conduct of the carrier amounted to a waiver of the delay in giving notice.

M. REASONABLENESS OF STIPULATION—BURDEN OF PROOF ON CARRIER.

Some authorities hold that the burden of proving the reasonableness of the restriction is upon the carrier. Cox *v.* Central Vt. R. Co., 170 Mass. 129, 49 N. E. 97; Fort Worth & D. C. Ry. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Good *v.* Galveston, H. & S. A. Ry. Co. (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98; Galveston, H. & S. A. Ry. Co. *v.* Boothe, 3 Tex. Civ. App. Cas. § 364; Missouri Pac. Ry. Co. *v.* Childers (Tex. Civ. App.), 29 S. W. 559; Missouri Pac. Ry. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574.

Must Be Shown to Be Reasonable in the Particular Case.—A stipulation that the shipper must give the carrier notice of his claim for injuries to stock, before their removal from the place of delivery, is not valid unless it is shown to be reasonable in the particular case, and it devolves upon the carrier to allege and prove facts which show it to be reasonable; and in the absence of such allegation and proof the stipulation will be regarded as invalid as unreasonable. So held in Galveston, H. & S. A. Ry. Co. *v.* Boothe, 3 Tex. App. Cas. § 364.

Before Removal of Cattle from Destination.—A stipulation of a bill of lading that the shipper must give notice of any claim for damages to the nearest station agent, and before the cattle are removed from the place of delivery, will only be enforced when shown to be reasonable, when considered in the light of the subject matter and the circumstances. So held in Fort Worth & D. C. Ry. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834.

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N. BURDEN OF PROVING EXISTENCE OF OPPORTUNITY TO COMPLY WITH REQUIREMENT.

In Missouri Pac. Ry. Co. *v.* Childers (Tex. Civ. App.), 29 S. W. 559, it is held that where a shipping contract stipulates that the shipper must give notice of any claim for damages to some general officers of the railroad, or to its nearest station agent, within one day after the delivery of the stock, and before they are removed, etc., the burden is on the carrier to show that it afforded the shipper reasonable facilities to comply with the contract, and where the cattle are delivered in a large city, in which it is doubtful whether the carrier has an officer known as the "station agent," it should also appear that the shipper knew what was meant by the term "general officers," and that they were so accessible that he could have reached them, by the exercise of reasonable diligence, within the time required.

O. BURDEN OF PROVING COMPLIANCE WITH REQUIREMENT.

Some of the authorities hold that the shipper must prove that the notice was given as required by the contract. Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026; Atchison, etc., R. Co. *v.* Crittenden, 4 Kan. App. 512, 44 Pac. 1000; Osterhoudt *v.* Southern Pac. Co. (N. Y. Sup. Ct.), 47 App. Div. 146, 62 N. Y. Supp. 134.

P. BURDEN OF PROVING NON-COMPLIANCE.

But there is a lack of harmony on this point, and there are decisions to the effect that the carrier has the burden of showing noncompliance with the requirement. The Westminister, 116 Fed. Rep. (D. C.), 123; Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 19 Am. & Eng. R. Cas., N. S., 30; Porter *v.* Southern Express Co., 4 S. Car. 135; Missouri Pac. Ry. Co. *v.* Hays (Tex. Civ. App.), 35 S. W. 476.

In an action for injury to freight, the carrier has the burden of showing a breach of a condition of the shipping contract requiring the shipper to give notice of any claim for damages within a period specified in the contract. So held in Missouri Pac. Ry. Co. *v.* Hays (Tex. Civ. App.), 35 S. W. 476.

Claim against Ship—Notice before Removal of Goods.—In The Westminister, 116 Fed. Rep. (D. C.), 123, it is held that a ship defending against a claim for damage to cargo in shipment, under a condition in the bill of lading exempting it from liability "for any claim, notice of which is not given before the removal of the goods," has the burden of proving that the notice was not given, to entitle itself to the benefit of the stipulation, but, when it has produced sufficient testimony to justify the inference that no claim was made, it is incumbent on the libelant to rebut such inference by evidence.

Failure of Freight to Arrive at Destination.—The bill of lading merely required, in this connection, that claims for damages must be reported within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. It was held that when a carrier invokes such a limitation of its liability it must show that both the spirit and the letter of the requirement was violated. Ward *v.* Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28, 19 Am. & Eng. R. Cas., N. S., 30.

Pleading and Proof.—In an action for damage to stock transported by rail, based on an agreement by the shipper to give notice of his claim, plaintiff need not allege nor prove the giving of such notice; and the burden of proving its absence is not met by showing that

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it was not given to the railroad's local agent, where under the contract it could be properly given to its general officers. So held in St. Louis, etc., Ry. Co. *v.* Hays, 13 Tex. Civ. App. Rep. 577, 35 S. W. 476.

Q. MISCELLANEOUS.

Unreasonably Short Time—Duty to Present within Reasonable Time.—In Osterhoudt *v.* Southern Pac. Co. (N. Y. Sup. Ct.), 47 App. Div. 146, 62 N. Y. Supp. 134, it is held that the fact that the contract of affreightment requires claims for loss or damage to be presented within an unreasonably short time does not relieve the shipper from the obligation of presenting his claims within a reasonable time.

(1) Pleading.

Failure to Give Notice and Opportunity to Do So.—In Houston & T. C. Ry. Co. *v.* Davis (Tex. Civ. App.), 31 S. W. 308, it is held that where the validity of a shipping contract depends upon the reasonableness of a provision that in case of injury to stock the shipper shall give notice of his claim therefor, in writing, to the freight agent, before it is delivered to any connecting line, or removed from the station, the carrier must, in order to be entitled to the benefit of such stipulation, allege in its answer a state of facts showing that the shipper had failed to give the notice before delivery to the connecting line, and that he had an opportunity to do so.

Nature of Limitation.—A receipt given by an express company stipulated that the company should not be liable for loss or damage unless the claim therefor was made in writing within thirty days from the accruing of the cause of action. It was held that the stipulation was not in the nature of a condition precedent to plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued, but was in the nature of a limitation, and could not be availed of upon trial unless set up in the answer. So held in Westcott *v.* Fargo, 61 N. Y. 542.

(2) Sufficiency of Notice.

Thirty-Two Cargoes—Claims Bunched, without Indicating Respective Shipments.—In Osterhoudt *v.* Southern Pac. Co. (N. Y. Sup. Ct.), 47 App. Div. 146, 62 N. Y. Supp. 134, it appeared that the consignor of 32 cargoes, instead of giving notice from time to time of the damage to each cargo waited until nearly three months after the last shipment, and ten months after the first, and then bunched the claims, without indicating the respective shipments to which the various items of damage pertained. It was held that this was not a reasonable compliance with the terms of a shipping contract requiring claims to be presented within a time assumed to be unreasonably short.

Merely Complaining by Letter of Delay and Extra Charges.—In Texas & Pac. Ry. Co. *v.* Jackson, 3 Tex. Civ. App. Cas. § 41, the shipping contract required the shipper to give notice in writing of any claim for damages to some general officer of the carrier or to its nearest station agent before he removed his cattle from the place of delivery, and before he mingled them with other cattle. The only notice of a claim for damages was a letter written by the shipper to the railroad's general freight agent, at St. Louis, complaining that the train which was transporting his cattle had been delayed on the route, and that the carrier's agents had exacted and compelled him to pay $15 extra expense of transportation. He made no claim in the letter for any loss of or injury to the cattle, or for

any damages except such extra charge. It was held that the letter was not a compliance with such contract requirement.

Claim Accompanied by Letter Filed as Bill of Particulars—Amendments.—But a claim in writing which has been presented to the railroad company accompanied by a letter explaining the full particulars of the transaction, charging it with the loss of 50 per cent. of 147 boxes of oranges, and for a return of the freight paid it thereon, is sufficient to notify the railroad of a claim against it for damages caused by the negligence of the company in the transportation of the oranges, and, when such claim has been filed before a justice of the peace as a bill of particulars, the plaintiff may, upon leave obtained from the court, file an amended bill of particulars setting out such damages and negligence, and does not thereby substantially change the claim against the railroad company. So held in St. Louis & San Francisco Ry. *v.* Bryan Fruit Co. (Kan. App.), 2 Am. & Eng. R. Cas., N. S., 691.

(3) Application of Stipulation.

Claim Accruing under Prior Verbal Contract before Signing of Bill of Lading.—In Receivers *v.* Graves (Tex. Civ. App.), 16 S. W. 102, it is held that a stipulation of a bill of lading that the shipper must give notice within a certain time by any claim of damage is not applicable to a claim accruing under a prior verbal contract before the bill of lading was signed.

Damage from Change of Market Not Covered.—A condition of a contract of affreightment that the shipper shall give the carrier notice of his damages within five days after the train's arrival at the place of delivery covers damage to the cattle themselves and not damage sustained by reason of a change of market. So held in Leonard *v.* Chicago & A. Ry. Co., 54 Mo. App. 293.

Hogs Placed in Stockyards at Intermediate Station—Deaths from Exposure before Reshipment.—In Wichita & W. Ry. Co. *v.* Koch, 8 Kan. App. 642, 56 Pac. 538, it appeared that a railroad company unloaded a car-load of fat hogs which it had received for shipment from Cheney, Kan., to Kansas City, Mo., and placed them in the stockyards at Wichita after the animals had been exposed to a very severe storm for several hours while the carrier was trying to return them from Wichita to the shipper. Eighteen hogs were dead at the time the car was reloaded at Wichita by the company to be forwarded to Kansas City, Mo., where they were delivered to the shipper's agent. It was held that the written notice required by the contract was not a prerequisite to the right to recover the value of the hogs which died before such reshipment.

Loss of Trunk—Verbal Claim within Contract Period—Necessity of Written Claim under Statute—Carrier's Knowledge of Loss.—In Hartwell *v.* Northern Pac. Express Co., 5 Dak. 463, 37 Am. & Eng. R. Cas. 635, 41 N. W. 732, an action to recover for the loss of a trunk shipped, the defense was an omission to make a written claim within the time required by the shipping receipt, which was not signed by the consignor, the court charged the jury that no written claim was necessary and that, if they found that plaintiff made a claim to the company's agent at the point where the trunk was shipped within the time required by the shipping receipt, and that the company had knowledge of the loss, they would be authorized in finding a verdict for plaintiff. Section 1263, Dak. Civ. Code, provides "a consignor * * * by accepting * * * a written contract for its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modifications

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of the carrier's * * * obligations contained in such instrument can only be manifested by his signature to the same." It was held that, under this section, the express company had no reason to complain of the charge.

Thirty Days from Date of Shipping Receipt—Not Applicable to Action against Ship—Steamship Company as Claimant.—A provision in the shipping receipts that all claims against the steamship company or any of its stockholders for damage to the shipment must be presented within thirty days from the date thereof, as a condition precedent to suing the company or its stockholders, does not cover the right to maintain a suit against the ship, in which the steamship company appears as claimant. So held in Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co. (C. C. A.), 94 Fed. Rep. 180.

Only Applicable to Claims against Initial Carrier.—A provision of a bill of lading requiring notice of any claim for damage to be given within ninety days is only applicable to claims against the initial carrier, and cannot inure to the terminal carrier's benefit. So held in Grayson County Nat. Bank *v.* Nashville, C. & St. L. Ry. (Tex. Civ. App.), 79 S. W. 1094.

Possession Retained after Delivery for Non-Payment of Freight —Condition Applicable to Carrier's Conduct as Warehouseman.— But a contract of shipment contained a stipulation that no claim for loss or damage to the stock shipped should be valid unless made in writing within thirty days after the same should have occurred. After the car reached its destination the defendant retained possession a few days for non-payment of freight. In an action for alleged negligence in the care of one of the horses after the transportation had ceased, it was held that such condition was applicable in respect to the carrier's conduct as a warehouseman, that relation being incident to that of carrier. Armstrong *v.* Chicago, etc., Ry. Co., 53 Minn. 183, 54 N. W. 1059.

A. R. Y.

KILEY *v.* RUTLAND R. CO.

(Supreme Court of Vermont, Rutland, Feb. 3, 1908.)

[68 Atl. Rep. 713.]

Master and Servant—Injury to Servant—Contributory Negligence.—Plaintiff testified that having unloaded freight from the middle of a long train, of which he was conductor, and the rear of which was a considerable distance from the station, the night being dark, and the only light he had being his lantern, he gave the starting signal from the platform, and on the train starting he moved hastily towards the rear of the train as far as the end of the platform; that on account of the darkness he was uncertain how far away the rear of the train was; that as the speed of the train was increasing and the caboose had behind it a passenger car with gates and a good deal of gearing at the rear end, he, out of regard for his safety, instead of waiting for the caboose or rear car, took hold of the grab iron of a freight car, while the train was going six miles an hour, put his foot on the stirrup below, swung himself around the end of the car to the end ladder, placed his foot on the lower round of the ladder, took hold of one of the upper rounds, was safely on the ladder, and was climbing it, when an end of a round gave way, causing him to fall; that the way in which he proceeded was a usual and ordinary way, the grab iron and stirrups being provided to enable trainmen to board a train in motion, as well as one standing still; that he omitted nothing in the regular process of climbing; that the train's speed had nothing to do with the round giving way; and that the only thing that had anything to do with his fall was the giving way of the round. Held, that this authorized a finding that he was free from contributory negligence.

Same—Negligence—Inspection of Cars.*—The inspection of a car, a round of a ladder of which, on account of the wood into which it was fastened being rotten, gave way, as the conductor was climbing it, could be found negligent, being made by the inspector merely walking along each side of the train and looking at the cars, the running gear, ladders, and so forth.

Same—Contributory Negligence—Inspection of Cars by Trainmen—Rules of Company.—The rule of a railroad company that trainmen

*For the authorities in this series on the subject of the care required of a railroad company, as an employer, in inspecting appliances, see foot-notes appended to Clippard *v.* St. Louis Transit Co. (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107; foot-notes appended to St. Louis, etc., R. Co. *v.* Wells (Ark.), 23 R. R. R. 104, 46 Am. & Eng. R. Cas., N. S., 104.

For the authorities in this series on the subject of the duty of a railroad company, as an employer, to inspect foreign cars, see foot-notes appended to New York, etc., R. Co. *v.* Hamblin (Ind.), 22 R. R. R. 701, 45 Am. & Eng. R. Cas., N. S., 701.

must inspect their trains before leaving a terminal and at intervals during the trip will not be held as matter of law to require a conductor to inspect the cars in the same way as car inspectors at terminal stations; there being evidence that what trainmen did under the rule was merely to look the trucks over to see if the connections were all right, and if the trucks were coupled up and in working order.

Same—Injuries in Performance of Duty.—Testimony of plaintiff, in an action by a conductor for injuries from a round of an end ladder of a car of his train giving way, as he was climbing it, after mounting the car while the train was moving, that grab irons and stirrups on cars were provided to enable trainmen to board a train in motion, as well as one standing, shows an incidental duty of mounting moving trains, and so supports the allegation of the declaration that it was a duty devolved on him by his employment to mount moving trains.

Same—Contributory Negligence.—An employee is not precluded from recovering for injuries received in a hazardous position which he has voluntarily and unnecessarily taken, where the hazard has in no way contributed to the injuries.

Same—Fellow Servants—Car Inspectors.†—A car inspector is not a fellow servant of the conductor of a train, but is intrusted with a duty resting on the railroad company, which it cannot delegate so as to relieve itself from liability for nonperformance, whether the cars be its own, or foreign cars carried by it, which foreign cars the company is required by statute to receive and transport at reasonable times and on reasonable terms.

Same—Negligence—Burden of Proof—Presumption.‡—While the burden of proof as to negligence is on plaintiff, in an action by a conductor for injuries from the ladder on a car giving way as he was climbing it, there is no presumption that the ladder was sufficient.

Appeal and Error—Sufficiency of Exceptions.—A mere general exception to the charge of the court on the subject-matter of seven

†As to whether inspectors of appliances, etc., and other railway employees are fellow servants, see foot-notes appended to Marsh *v.* Lehigh Valley R. Co. (Pa.), 9 R. R. R. 545, 32 Am. & Eng. R. Cas., N. S., 545, where all those preceding it are collected, foot-notes appended to Snellen *v.* Kansas City So. Ry. Co. (Ark.), 25 R. R. R. 110, 48 Am. & Eng. R. Cas., N. S., 110.

‡For the authorities in this series on the question whether a presumption of negligence arises from the fact that an employee is injured, see foot-notes appended to Land *v.* Southern Ry. (S. Car.), 9 R. R. R. 155, 32 Am. & Eng. R. Cas., N. S., 155, where all those preceding it are collected; foot-notes appended to St. Louis, etc., Ry. Co. *v.* Standifer (Ark.), 25 R. R. R. 377, 48 Am. & Eng. R. Cas., N. S., 377; foot-notes appended to Eliot *v.* Kansas City, etc., R. Co. (Mo.), 24 R. R. R. 740, 47 Am. & Eng. R. Cas., N. S., 740; Southern Ry. Co. *v.* Carr (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

requests for instructions, covering, in a more or less involved form, a large part of the law applicable to the case, is insufficient; but to bring before the appellate court for review any proposition stated in the charge a specific exception to it was needed.

Exceptions from Rutland County Court; Loveland Munson, Judge.

Action by Eugene Kiley against the Rutland Railroad Company. There was a verdict and judgment for plaintiff, and defendant excepted. Affirmed.

Argued before ROWELL, C. J., and TYLER, WATSON, and HASELTON, JJ.

Butler & Moloney, for plaintiff.
H. Henry Powers and *P. M. Meldon,* for defendant.

HASELTON, J. This was an action on the case for negligence. It appeared that the plaintiff was conductor of a local freight train of the defendant which left North Bennington for Rutland June 3, 1903, in the afternoon. The train, as made up at North Bennington, a terminal point, consisted of some 22 or 23 cars, counting the caboose and a passenger coach which were at the rear, and the length of the train was not greatly varied, though at different stations cars were set out and others were taken in. The plaintiff was injured at North Dorset, where a small amount of freight was unloaded. At the close of the evidence the defendant moved to have a verdict directed in its favor. This motion was overruled, and the defendant took an exception. The entire evidence is referred to on the questions raised by this exception.

The plaintiff's evidence tended to show that the passenger coach was behind the caboose at the very rear end of the train, was empty of passengers, and had gates and "a good deal of rigging" at the rear entrance thereto. His testimony tended to show that the freight that was unloaded at North Dorset was unloaded from a car about the middle of the train; that the cars were from 28 to 40 feet in length, making the train a long one, and leaving the rear end of the train a very considerable distance from the station; that the night was dark and the station unlighted; that all the light the plaintiff had was from his lantern; that, after the freight was unloaded at North Dorset, the plaintiff did not travel back in the darkness with his lantern to the caboose before giving the signal for starting, but that he gave, or caused to be given, the signal from the platform; that the train started, and that he then moved hastily towards the rear of the train as far as the end of the platform, which was a gravel structure; that on account of the darkness he was uncertain as to how far from him the rear end of the train was; that as the speed of the train was increasing, and as the caboose would be

followed by a passenger car, he thought it might be unsafe to wait for the caboose, as he would have otherwise considered it safe to do, and that on account of the gearing of the gates at the rear end of the passenger coach he thought he might get his hand caught if he waited for the very rear end of the train, and that therefore, out of regard for his safety, as a Boston & Maine car, which proved to be the fourth car from the last, was going by at about six miles an hour, he took hold of the grab iron on the side of the car, put his foot on the stirrup below, swung himself around the end of the car to the end ladder, placed his foot on the lower round of the ladder, took hold of one of the upper rounds with his hand, was safely on the ladder, and was climbing it, when the inside end of a round which he had hold of gave way, causing him to lose his balance and fall; that he overlooked or omitted nothing in the regular process of climbing; that the speed of the train had nothing to do with the giving away of the round; and that the only thing that had anything to do with his fall was the giving way of the round in question. The plaintiff testified to long service on the defendant's road, and to familiarity with its rules; that he knew the rules required him to look out for his safety; that he considered the course he took a safe one; that the way in which he proceeded was a usual and ordinary way; and that grab irons and stirrups were provided for the purpose of enabling trainmen to board a train in motion as well as to get onto one standing still. The plaintiff, though testifying that the inside end of the round gave way so that the round hung down, did not undertake to say how it gave way. He, however, called as a witness one Collins, whose testimony, taken with other testimony, tended to show that the fastening at one end of the round pulled out, leaving splinters and rotten wood visible.

The defendant's evidence tended to show that the plaintiff was under the influence of intoxicating liquor at the time of the accident, while evidence on the part of the plaintiff tended to show that he was sober and had not been drinking. The evidence of two car inspectors of the defendant, Schryer and Taylor, tended to show that an inspection made after the accident disclosed no such condition as must have existed if the testimony of the plaintiff and Collins was true. A considerable part of the evidence of the defendant was directed to the point that the accident did not happen in the manner testified to by the plaintiff. The car inspector of the defendant at North Bennington was one Howley, and his testimony tended to show that the inspection of the cars in the Kiley train was made by him after the train was drawn up, and was made by walking along on each side of the train and looking at the cars, their running gear, ladders, and so forth. There was some evidence of an examination of some of the cars in Kiley's train before the train was made up, but there was evidence from which it could fairly be inferred that

the only real inspection of the car in question was made when it was in the train as before stated. The nature of that inspection, as the testimony tended to show it, has been referred to.

The first ground of the motion to have a verdict directed for the defendant was: "That the attempt of the plaintiff to board the train in motion, as testified to by him, without any necessity then pressing upon him, but, as he says, because he had done it before safely and he supposed he could safely do it again, and whether he lost his job or not, if left behind, was negligence per se; and that, as matter of law on the plaintiff's own testimony in this behalf, he assumed the risk of the experiment, and could not recover damages received thereby, whether the defendant was negligent or not in respect to the condition of the ladder, and whether or not the plaintiff was under the influence of intoxicating liquor." But enough references to the testimony have been herein made to show that it cannot be said as matter of law that in no view of the evidence was the plaintiff free from contributory negligence. There was a view of the evidence which reasonable men might take that exonerated him from contributory negligence that was inconsistent with the claim that his manner of boarding the train was an "experiment"—a view that recognized his right to be where he was when the round gave way, and that contemplated the giving way of the ladder round as the sole cause of the injury.

The second ground of the defendant's motion for a verdict was as follows: "The car claimed to have been defective, being on the plaintiff's own testimony a foreign car, the defendant owed the plaintiff the duty only of inspection by a competent inspector, and no claim is made by the plaintiff that the inspector was incompetent, except in the single instance of the inspection of the plaintiff's train in the manner above stated." No question was made but that Howley was competent, and in view of the course of the argument this statement of the second ground for the motion is treated as raising the question of whether there was evidence tending to show that his inspection in this instance was negligent. From a review of the evidence it is clear that it cannot be said as matter of law that Howley's inspection was not negligent. It appears from the evidence of the defendant that the inspection made by Howley was substantially the same as that made by the two inspectors of the company who inspected the train after the injury to Kiley, and who, as they testified, found nothing wrong about the ladder or rounds. If the jury believed Kiley and Collins and also all the inspectors, they may well have found that Howley's inspection was negligent under any standard of duty whatever.

The third ground of the defendant's motion for a verdict was that Kiley, the plaintiff, did not make the inspection required of him by a written rule of the company with which he was familiar,

and that by such failure he was guilty of contributory negligence, and therefore could not recover. The rule invoked is 510 of the defendant company's book of rules, and reads as follows: "Trainmen must inspect their trains before leaving a terminal and at intervals during the trip." Kiley testified to the effect that what the trainmen did under the rule was to look the trucks over to see if the connections were all right, if the trucks were coupled up and in working order. His evidence tended to show that this train inspection did not relate to the ladders, and was something different from the inspection of the cars. There is nothing unreasonable in the view that a rule which imposes upon all trainmen the duty of inspecting their trains at terminals and at intervals during a trip is a very different duty from that imposed upon car inspectors at terminal stations, and the practical construction which Kiley testified was put upon the rule by trainmen seems to be the true one. The motion to have a verdict directed for the defendant was properly overruled. The defendant was entitled to have the case submitted to the jury under proper instructions as to contributory negligence and the assumption of risks, but in the state of the evidence the case could not be taken from the jury.

The defendant submitted seven requests to charge which were not in terms complied with. The first request was: "That the plaintiff must prove every affirmative allegation material to the issue that is set up in his declaration. He must prove that in mounting the car as he claims it was a duty devolved upon him by his employment for the defendant; and, there being no proof in the case that any such duty was imposed upon him by the defendant, or was fairly required by the duties of his service at the time of the accident, he cannot recover." The argument made by the defendant upon this request, which asked the court to instruct the jury that their verdict must be for the defendant, is that it is one of the material allegations of the declaration that it was the duty of the plaintiff to mount moving trains, and that there was no evidence whatever of any such duty. But the evidence of the plaintiff as to the movement of trains and the use of grab irons and other appliances tended to show that trainmen were expected to mount moving trains. Several inquiries were put to the plaintiff in cross-examination, with the apparent purpose of shaking his testimony to show that the mounting of moving cars was incidental to his employment, but these inquiries elicited nothing of a discrediting character. The practical necessity on the part of trainmen of mounting moving cars is recognized by the law, which provides that railway companies shall equip their cars with end ladders rather than with side ladders. Kiley's testimony with respect to the incidental duty of mounting moving trains does not appear to have been contradicted.

The second request was this: "That there was no emergency

present before the plaintiff at North Dorset that required him to mount a moving train in the nighttime, and that it is a principle of the law of negligence well settled by repeated decisions of the courts all over the country that a party cannot voluntarily and unnecessarily place himself in a position that he knows is dangerous, or that an ordinarily prudent man in his position would know is dangerous, when there are other positions that he might take in the discharge of his duty that are safe, and if he does so he cannot recover any damages for the injuries he may receive." To say nothing of this request in other respects, it is enough to point out that it denies recovery of damages to one who has received injuries in a hazardous position which he has voluntarily and unnecessarily taken, although the hazard to which he has exposed himself has in no way contributed to his injuries. Corbin *v.* Railway Co., 78 Vt. 458, 63 Atl. 138. The defendant cites several cases, but what is said in the cases so cited is guarded in the very respect in which this request is not guarded.

The third request was as follows: "The plaintiff avers in his declaration that: The defendant employed incompetent servants to inspect its cars. The burden of proof is upon the plaintiff to make out this fact, if the plaintiff relies upon such incompetency to support his case. That the competency of the servant is to be presumed until the contrary appears. That a single act of negligence is not enough to support the claim of incompetency. That the only act proved in this case that the plaintiff may claim is negligence on the part of Howley, the inspector, is his omission to test the rounds of this ladder by applying force to them. That the jury are not at liberty to set up their own standard as to the competency of Howley, nor as to the methods to be applied to make a proper test, but are limited and confined to the proof in the case in respect to that question; and, there being no evidence in the case showing or tending to show his incompetency except this single omission, the jury are charged that incompetency is not established." This request relates to the question of the competency of Howley. But the court disposed of the question of incompetency by charging, in accordance with the defendant's contention, that there was no evidence tending to show that Howley was an incompetent inspector, and no claim that he was. In argument this request is treated as touching on the question of Howley's negligence, and that element is, in a way, woven into the request. But upon that question it is enough to refer to what is herein said in considering the second ground of the defendant's motion to have a verdict directed.

The defendant fourthly requested the court to charge that, "If Howley was incompetent or otherwise negligent, or negligent in the discharge of his duties, he was a fellow servant of this plaintiff, and for that reason this plaintiff cannot recover." There is no occasion for saying anything further about the question

of competency; but under this request the question is for consideration whether or not the inspector, in the discharge of his duties as such, was a fellow servant of the plaintiff, so that the plaintiff is disentitled to recover because of the fellow-servant doctrine. If the case of Hard *v.* Railroad Co., 32 Vt. 473, is law, the plaintiff and Howley were fellow servants. But that case was shown to have been erroneously decided in the fully and carefully considered case of Davis *v.* Railroad Co., 55 Vt. 84, 45 Am. Rep. 590. The Davis Case practically overrules the Hard Case. That negligence in respect to inspection generally is the master's negligence is the doctrine of Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380. The opinion cites Davis *v.* Railroad Co. as authority, and makes no reference to Hard *v.* Railroad Co., for the obvious reason that the case is not authority. See, also, Mahoney's Adm'r *v.* Railroad Co., 78 Vt. 244, 62 Atl. 722, and Reynolds *v.* Railroad Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908. There are several cases in other jurisdictions which hold that a railroad company's inspectors, in the inspection of its own cars, act as fellow servants of trainmen. These cases are in line with the Hard Case in this state just referred to. But it must be said that to-day the doctrine is very generally and firmly established that such inspectors so acting are in the performance of a duty which peculiarly rests upon the company, and which the company cannot so delegate as to relieve itself from responsibility for its non-performance. See Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Union Pacific R. Co. *v.* Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 369, 13 Sup. Ct. 914, 37 L. Ed. 772; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Northern Pacific R. Co. *v.* Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Northern Pacific R. Co. *v.* Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Hough *v.* Railroad Co., 100 U. S. 213, 25 L. Ed. 612; and see the cases cited in the above list. In this state the principle applicable is now so well settled as to make discussion of it superfluous.

In the case at bar it is more particularly urged by the defendant that, in the inspection of foreign cars, the inspectors of a railroad company are fellow servants of the trainmen of the train into which the cars go; that the duty of the master is discharged when he makes provision for inspection by competent inspectors. Upon this question it was more difficult 15 or 20 years ago to say on which side the weight of authority rested than it is now to say on which side it rests. The great preponderance of recent authorities goes to establish the doctrine, which this court now declares and applies, that an inspection of foreign cars as they come to a company from other roads is the receiving company's duty, growing out of its obligation to exercise cir-

cumspection for the safety of its employees, and that, such being the character of the duty, whoever is commissioned to dicharge it acts as the representative of the company and not as the fellow servant of trainmen, and that, however competent the inspector may be, his negligence, if he is negligent, is the negligence of the company for which it is responsible under the general law of negligence without protection from the fellow-servant doctrine. Gottlieb *v.* Railroad Co., 100 N. Y. 462, 3 N. E. 344; Goodrich *v.* Railroad Co., 116 N. Y. 398, 22 N. E. 397, 5 L. R. A. 750, 15 Am. St. Rep. 410; Eaton *v.* Railroad Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600; Jones *v.* Railroad Co., 20 R. I. 210, 37 Atl. 1033; Gutridge *v.* Railroad Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392; Louisville, etc., R. Co. *v.* Williams, 95 Ky. 199, 24 S. W. 1, 44 Am. St. Rep. 214; Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Missouri, etc., R. Co. *v.* Chambers, 17 Tex. Civ. App. 487, 43 S. W. 1090; International, etc., R. Co. *v.* Kernan, 78 Tex. 294, 14 S. W. 668, 9 L. R. A. 703, 22 Am. St. Rep. 52; Jones, Receiver, *v.* Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690; Union, etc., Co. *v.* Goodwin, 57 Neb. 138, 77 N. W. 357; Missouri, etc., R. Co. *v.* Barber, 44 Kan. 612, 24 Pac. 969; Atchison, etc., R. Co. *v.* Penfold, 57 Kan. 148, 45 Pac. 574; Budge *v.* Morgan's etc., Co., 108 La. 349, 32 South. 535, 53 L. R. A. 333; Moon *v.* Railroad Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 195; Dooner *v.* Canal Co., 164 Pa. 17, 30 Atl. 269; Mason *v.* Railroad Co., 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050; Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624. The above cases are referred to as fully sustaining the proposition that in the inspection of the foreign car in question the inspector, Howley, was not the fellow servant of the plaintiff, Kiley. The request which we are now considering raises no question as to the degree of thoroughness of the inspection which the company was in duty bound to make, and the cases last cited are not referred to for their bearing upon that question.

There are a few cases which sustain the defendant's contention, but for the most part they are from courts whose later decisions are given above. The case of Mackin *v.* Railroad Co., 135 Mass. 201, 46 Am. Rep. 456, sustains the defendant's contention, and has never been overruled, though in consequence of a legislative enactment the Massachusetts court is now able to apply and does apply the law as it is generally understood. See Bowers *v.* Railroad Co., 162 Mass. 312, 38 N. E. 508. The case of Smith *v.* Potter, Receiver, 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161, makes an inspector a fellow servant of a trainman in respect to the inspection of foreign cars, but does this on the

untenable ground that an inspector is a fellow servant of trainmen in the inspection of cars whether they are foreign or not. The ground on which this case was decided is no longer maintained by the court which rendered the decision therein. McDonald v. Railroad Co., 132 Mich. 372, 93 N. W. 1041, 102 Am. St. Rep. 426. Anderson v. Railroad Co., 68 N. J. Law, 647, 54 Atl. 830, though not on the defendant's brief, was somewhat relied on in oral argument. But that case disapproves of the Massachusetts doctrine as announced in Mackin v. Railroad Co., 135 Mass. 201, 46 Am. Rep. 456, and holds that a company receiving a foreign car for transportation is bound to make such examination as would be likely to discover conditions which would render the car unsafe for use, assuming its original contruction to have been proper. The few cases which relieve a railroad company from a master's duty in respect to the inspection of foreign cars do so, in so far as any reason is given, upon the ground that the company as a common carrier and by statute law must receive and forward such cars. Our statute provides that a railroad company shall receive and transport such cars at reasonable times and on reasonable terms, and the statutes of other state are very similar. Such statutes are intended to prevent unjust discriminations and ill-grounded obstuctions; but the argument is far fetched that the duty to transport cars "at reasonable times and on reasonable terms" obliges a company to transport a car which is in unsafe condition, or relieves the transporting company from a master's duty of inspection, or makes the inspector in the performance of that duty a fellow servant of the trainmen of the train into which the foreign cars go. Every company that transports a foreign car loaded with freight uses the car in its own business of carrying freight for hire. See Reynolds v. Railroad Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908.

The defendant's fifth request was: "That the sufficiency of the ladder is to be presumed, unless there be evidence in the case that with fair usage it was insufficient." In respect to the matter of the request, there was no presumption of law, but rather an absence of such presumption. Negligence on the part of the defendant was not to be presumed. Insufficiency of the ladder was not to be presumed. The burden of proof in respect to such negligence and such insufficiency was on the plaintiff, and there the charge of the court correctly placed it.

The defendant's sixth request was as follows: "That the plaintiff was not justified in choosing one of two dangerous positions to mount a moving train, if a safe position was available to him, and had no right to start his train and thereby create a dangerous condition, and then, with such condition present, attempt to board the moving train. If he did this, he assumed the risk of his attempt, and the defendant is not liable for his in-

juries." In their brief counsel for the defendant very properly considered this request in connection with the second request, and the court could not comply with it for the same reason that it could not comply with the second request. This request like the second if complied with would have precluded the plaintiff from recovering for his injuries even if the jury found, as under the testimony they might, that the risk of the attempt, whatever it may have been, did not contribute to the injury. What is herein said in considering the second request need not be repeated.

The defendant's seventh request, not complied with to the satisfaction of the defendant, was the following: "The mere fact that a fellow servant is incompetent, or that the materials have proved defective, or that the appliances or machinery used in the prosecution of the business have proved insufficient, does not tend even prima facie to establish any negligence on his part, but the burden in all such cases is upon the servant seeking recovery to establish the fact that the master did not use reasonable care in these respects or either of them." The defendant's brief does not argue this request, but simply says: "The seventh request should have been complied with." However the charge upon the burden of proof and upon the matters connected therewith was a substantial compliance with this request. Reference is made to Morrisette *v.* Railroad Co., 76 Vt., on page 278, 56 Atl., on page 1105, for what was deemed a substantial compliance with a request applicable there and here, though not always, that "there is no presumption of negligence from the mere happening of the accident."

The defendant also excepted to the charge of the court upon the subject-matter of the above seven requests. This exception was altogether too vague and general to avail anything. As has been seen, these seven requests covered in a more or less involved form a large part of the law applicable to the case. If in the course of the charge the court stated any proposition which the defendant's counsel deemed unsound, a specific exception was needed to bring the proposition before this court for review. White *v.* Lumiere, etc., Co., 79 Vt. 206, 64 Atl. 1121, 6 L. R. A. (N. S.) 807; Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725; State *v.* Sargood, 77 Vt. 80, 58 Atl. 971.

The trial court should always know what is excepted to. This court should always be able to see that a question argued here was distinctly raised below.

Judgment affirmed.

LOUISVILLE & N. R. CO. *v.* BROWN.

(Court of Appeals of Kentucky, Jan. 9, 1908.)

[106 S. W. Rep. 795.]

Master and Servant—Railway Trainmen—Gross Negligence.—It was grossly negligent towards those on an approaching train for the engineer and conductor of a work train to permit it to stand on a main track on the other train's time, though the engineer directed the brakeman to flag such other train; the brakeman's failure to do so being also gross negligence.

Same—Fellow Servants.*—The engineer, conductor, and brakeman of a train, which they negligently permitted to stand on a main track on another train's time, were not fellow servants of a brakeman on the other train, in the sense that he could not recover from the company for injuries received in the collision resulting from such negligence.

Same—Superior Officers.†—The rule that no recovery may be had from a master for injury to a servant, not causing death, resulting from the servant's superior officer's ordinary negligence, is limited to cases in which the superior officer has immediate control of or supervision over the servant.

Same—Fellow Servants.‡—A servant may not recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross such negligence may be; but recovery may be had for the negli-

*See foot-notes appended to Cincinnati, etc., Ry. Co. *v.* Curd (Ky.), 22 R. R. R. 69, 45 Am. & Eng. R. Cas., N. S., 69; Cincinnati, etc., Ry. Co. *v.* Hill's Adm'r (Ky.), 22 R. R. R. 52, 45 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to Kane *v.* Erie R. Co. (C. C. A.), 20 R. R. R. 383, 43 Am. & Eng. R. Cas., N. S., 383; Kane *v.* Erie R. Co. (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233; Choctaw, O. & G. Ry. Co. *v.* Doughty (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; Sherman *v.* Texas, etc., R. Co. (Tex.), 18 R. R. R. 637, 41 Am. & Eng. R. Cas., N. S., 637.

†For the authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-notes appended to Neagle *v.* Syracuse, etc., R. Co. (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; foot-notes appended to Lanning *v.* Chicago G. W. Ry. Co. (Mo.), 22 R. R. R. 81, 45 Am. & Eng. R. Cas., N. S., 81; foot-notes appended to Betchman *v.* Seaboard Air Line Ry. (S. Car.), 21 R. R. R. 535, 44 Am. & Eng. R. Cas., N. S., 535.

‡See foot-notes appended to Waller *v.* Wilmington City Ry. Co. (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; McDermott *v.* Severe (U. S.), 21 R. R. R. 628, 44 Am. & Eng. R. Cas., N. S., 628; Sappington *v.* Atlanta, etc., R. Co. (Ga.), 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846.

gence of other of the master's servants, whether it be ordinary or gross.

Damages—Personal Injuries—Evidence—Admissibility.§—In an action against a railway company for injury to plaintiff in a wreck, he could show mental anguish and pain suffered while pinioned in the wreck and in momentary danger of being burned to death.

Evidence—Photographs.—Photographs of a railway wreck, their accuracy being shown by the photographers, are admissible in evidence in an action against the company for injuries received in the wreck.

Damages—Personal Injuries—Excessive Verdict.—$10,000 is an excessive recovery for injury to a foot and other parts of plaintiff's body, where the injuries do not appear to be permanent, though punitive damages are allowable.

Appeal—Review—Damages.—The Court of Appeals has the same power to set aside a verdict involving punitive damages as it has where only compensation is recovered, and in every case, if the verdict appears to have been given under the influence of passion or prejudice, a new trial will be granted.

Appeal from Circuit Court, Hopkins County.
"To be officially reported."

Personal injury action by Harry Brown against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions for a new trial.

Benjamin D. Warfield and *Clifton J. Waddill,* for appellant.
Sypert & Phillips, for appellee.

CARROLL, J. Appellee, who was a head brakeman on one of appellant's freight trains, while riding in the engine, was seriously injured in a head-on collision between the engine in which he was riding and one of appellant's work trains. The work train was on the main track on the time of the freight train, and although the engineer of the work train testified that he directed a brakeman to flag the freight, and supposed he had done so, it developed that he had not, and the freight, running at a high rate of speed, had no notice that the work train was on the track until the engine was within a few feet of it, and when it was too late to stop or reduce the speed or avoid a collision. As a result of the collision, appellee was thrown under a large mass of wood and iron, and so fastened that he could not immediately be extricated. While in this position, where he remained for about an hour, the wreck caught fire, and appellee believed, and, indeed, had good

§For the authorities in this series on the admissibility of photographs as evidence in negligence cases, see foot-notes appended to McFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; Chicago, etc., R. Co. *v.* Cross (Ill.), 20 R. R. R. 512, 43 Am. & Eng. R. Cas., N. S., 512.

reason to believe, that he would be burned to death before he could be rescued; but fortunately, before the fire reached him, he was removed from his perilous position, and escaped with severe injuries to one of his feet and some other parts of his body. He alleged in his petition to recover damages that "the agents and servants of defendant, in charge of the trains and superior in authority to plaintiff, managed and operated the trains and their crews with such gross negligence and carelessness that they came together in a head-on collision, whereby he sustained permanent injury and suffered great mental and physical pain." In its answer, after traversing the material averments of the petition and charging that appellee was guilty of contributory negligence, it set up in a separate paragraph that "the collision was due solely to the ordinary negligence of the flagman of the work train, who was then and there in the same field of labor and the same grade of employment as plaintiff in the employ of a common master, and was not superior in authority, but was his fellow servant." On motion of appellee this defense was stricken from the answer. Upon the trial appellee recovered a judgment for $10,000, which we are asked to reverse (1) because the trial court erred in permitting testimony to go to the jury showing the negligence of the brakeman on the work train; (2) in striking from the answer the words before mentioned; (3) in failing to instruct the jury that there could not be a recovery unless the persons in charge of the work train were guilty of gross negligence; (4) in admitting testimony of appellee and other witnesses that while under the wreck of the colliding engines he was in danger of being burned to death; (5) in allowing photographs of the scene of the collision to be introduced in evidence; (6) that the damages are grossly excessive.

We will consider the first, second, and third assignments of error together. It was the duty of the engineer and conductor in charge of the work train to know that proper measures had been taken to flag the freight or notifiy it that the work train was on the track. They knew the freight was due, and that they were on the main track on its time. Although the engineer testifies that he directed a brakeman to flag the freight, and supposed he had done so, his attempted performance of duty will not relieve the company from liability for the accident. The conductor and engineer were in control of the work train, and were charged with the duty of taking every possible precaution to see to it that timely warning was given to the approaching freight. They, as well as the brakeman, were guilty of gross negligence, although the company would be liable to appellee if they, or the brakeman alone, had only been guilty of ordinary neglect. Neither the conductor nor engineer on the work train, or the brakeman who participated in their negligence and equally with them was guilty of a failure to

discharge his duty, were fellow servants of appellee in the sense that appellee could not recover for their negligence. It has been frequently ruled by this court that a servant for injuries not resulting in death cannot recover from the master for the ordinary negligence of his superior officers. Kentucky Distilleries & Warehouse Co. *v.* Schrieber, 73 S. W. 769, 24 Ky. Law Rep. 2236; C., N. O. & T. P. Ry. Co. *v.* Palmer, 98 Ky. 382, 33 S. W. 199; Greer *v.* L. & N. R. R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Linck's Adm'r *v.* L. & N. R. R. Co., 107 Ky. 370, 54 S. W. 184. But this doctrine is limited in its application to cases in which the servant is injured by the negligence of the superior officer who has immediate control of or supervision over him. To illustrate: If appellee had been injured by the negligence of the engineer or conductor on his train, he could not recover damages against the company unless they were guilty of gross neglect. The reason of this rule is that the servant, when he engaged to work, undertakes that he will assume the ordinary risks incident to the employment, and will not hold the master liable for the ordinary negligence of those employees with whom he is engaged, whose actions and conduct he can observe and, if necessary, guard against.

This doctrine of assumed risk by the servant has been further extended by this court until now it is well established that a servant cannot recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross the negligence of the fellow servant may be. Hence, if appellee had been injured by the negligence of a fellow brakeman on the train he was working on, without any fault on the part of the conductor, or engineer, or other superior, or breach of duty on the part of the company, he could not recover in this action. In L., C. & L. R. Co. *v.* Cavens' Adm'r, 9 Bush, 559, the proposition before us was under consideration by the court, and it was said: "It is well settled that where one enters into service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against. And it is equally as well established that, where a number of persons contract to perform service for another, the employee not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of his duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. Public policy requires that, where the laborers are coequals and engaged in laboring in the same field, or on the same railroad train, or in any other employment, each should exercise proper care in the conduct of the business, and

look to it that his colaborer does the same thing; and, when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution." And this principle was fully recognized and applied in L. & N. R. R. Co. *v.* Sanders' Adm'r, 44 S. W. 644, 19 Ky. Law Rep. 1941; Volz *v.* C. & O. Ry. Co., 95 Ky. 188, 24 S. W. 119; Dana *v.* Blackburn, 90 S. W. 237, 28 Ky. Law Rep. 695; Martin *v.* Mason & Hoge Co., 91 S. W. 1146, 28 Ky. Law Rep. 1333; Pitts, Hankins & Trundell *v.* Centers, 98 S. W. 300, 30 Ky. Law Rep. 311.

But when the servant is injured by employees of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds. And so appellee, whose injuries were directly caused by the negligence of the employees on the work train, may recover from the company, without regard to which one of them was guilty of the neglect that resulted in his injuries. The distinction between the liability of the master for injuries to the servant, when the injury is caused by the neglect of those engaged directly with the servant, and when it is due to the carelessness of employees not immediately associated with him, was first recognized by this court in L. & N. R. R. Co. *v.* Collins, 2 Duv. 114, 87 Am. Dec. 486, in a case against the company to recover damages for personal injuries inflicted by the negligence of the engineer, where it was said: "The company is responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars; and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient. As to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross. As to employees in a different department of service unconnected with the running operations, ordinary negligence may be sufficient."

And subsequently this distinction was more clearly expressed and applied thus: In Kentucky Central Ry. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480, the action was brought for personal injuries received by Ackley, who was an engineer upon a passenger train, resulting from a collision with a freight train of the company. It was contended by the company that, as the injuries were caused by the negligence of em-

ployees in the same grade of employment as the person injured, there could be no recovery. But the court, in rejecting this contention, quoted with approval the principle announced in L., C. & L. R. Co. *v.* Cavens' Adm'r, *supra,* saying: "It is argued in that case that the rule should be applied that when a number of persons contract to perform a service for another, the employees not being superior or subordinate to each other in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other, or occupies such a position in the service with reference to his colaborer as precludes him having any control over his actions or the right to advise even as to the manner in which the service is to be performed." In Illinois Central Ry. Co. *v.* Hilliard, 99 Ky. 684, 37 S. W. 75, Hilliard, who was a conductor, was injured by the giving way of a ladder on one of the cars in his train. The company requested the court to say to the jury that the car inspector, whose duty it was to keep the ladders in repair, and the conductor, were fellow servants engaged in the same line of service, and that Hilliard could not recover unless the jury believed the inspector guilty of gross negligence. This court, in commenting on this request, said that the instruction was properly refused, the conductor and inspector "acted in different spheres, and neither could or was required to know whether the other was properly doing his duty," and held that the company was liable for the ordinary negligence of the inspector.

In L. & N. R. R. Co. *v.* Lowe, 118 Ky. 260, 80 S. W. 768, 65 L. R. A. 122, C., N. O. & T. P. Ry. Co. *v.* Hill's Adm'r, 89 S. W. 523, 28 Ky. Law Rep. 530, and L. & N. R. R. Co. *v.* Hiltner, 56 S. W. 654, 21 Ky. Law Rep. 1826, the rule announced in the Collins, Cavens, and Ackley Cases was followed. In the cases of L. & N. R. R. Co. *v.* Robinson, 4 Bush, 507, L. & N. R. R. Co. *v.* Rains, 23 S. W. 505, 15 Ky. Law Rep. 423, and Robinson *v.* L. & N. R. R. Co., 24 S. W. 625, 15 Ky. Law Rep. 626, it was apparently held that an employee on one train could not recover from the company for the negligence of the employees on another train unless their negligence was gross; but these cases may now be regarded as having been overruled by the later ones above referred to, and it must be considered as no longer an open question in this state that there may be a recovery in a case like the one before us, although the negligence of the person causing it was ordinary. Hence the court correctly instructed the jury that, if they believed from the evidence that the injury to plaintiff's foot was the direct result of negligence on the part of the agents or servants of the defendant in charge of the work train, they should find for the plaintiff.

Nor did the court err in striking from the answer the defense

that the brakeman on the work train was a fellow servant of appellee, and therefore the company was not responsible to appellee for his neglect.

Appellee was permitted to testify that, while he was pinioned in the debris of the wreck, he knew it was on fire and was fearful that he would be burned to death before he could be extricated; and other witnesses were allowed to say that they saw the fire burning close to him. In our opinion it was competent to permit appellee to testify as to the mental anguish and pain that he suffered while he was fastened in the wreck. If he had not sustained any physical injury, he could not recover at all for the mental suffering he endured, as was said in Morse *v.* C. & O. Ry. Co., 117 Ky. 11, 77 S. W. 361: "Damages cannot be recovered for mental suffering alone in an action for personal injuries based on negligence, unaccompanied by some direct contemporaneous injury to the person." But where there is a physical injury there may be a recovery for it, as well as the mental pain and suffering occasioned by and accompanying it. Mental as well as physical suffering directly caused by an injury is a part of the compensation to which the injured person is entitled; and in the cases, without exception, that have come under our notice, the jury have always been instructed that they might compensate for mental as well as physical pain. Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453. As it was competent for appellee to describe fully and accurately his pain and suffering after he was extricated from the wreck and during the time the cure was being effected, and in fact up to the time of the trial, we are unable to understand upon what theory it can be maintained that it was not competent for him to relate the torture he endured when under the wreck and in momentary danger of being burned to death. In our opinion it is not at all material or important whether the mental suffering is contemporaneous with the reception of the injury or subsequent to it, if it is the direct result of it. In the able and exhaustive opinion in Denver & Rio Grande R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, this question was fully covered, and the conclusion reached that evidence of this character is competent.

It was also admissible for appellee, as well as those who saw him under the wreck, to describe the surroundings and conditions that existed, so that the jury might know all the facts and circumstances of appellee's situation when injured. The accuracy of the photographs was testified to by the person who took them, and they furnished to the jury a more complete and realistic picture of the wreck of the colliding engines than could be obtained from any other source. The wreck could not be seen by the jury, nor could it be accurately described by the witnesses; but from an inspection of the photographs the jury could obtain a more correct impression and a better understanding of the

situation than in any other way. Denver & Rio Grande R. Co. *v.* Roller, *supra*; 11 Am. & Eng. Ency. of Law, p. 539; 17 Cyc. 414.

Although there was no error in the admission of evidence or the instructions given by the court, we feel constrained to reverse the judgment upon the ground that the verdict is excessive. If there was sufficient evidence to show appellee's injuries were permanent, we would not interfere with the finding of the jury upon this point; but there is not. That he sustained severe injury, not only to his foot but other parts of his body, there is no doubt; but, whether they are permanent or not is another question. Appellee, in answer to the question, "Is your foot permanently injured or not?" answered, "I believe it is." Dr. Sorry, the only physician who testified for appellee, said that he had made only one examination of appellee's foot, and that a few days before the trial. The material parts of his evidence are as follows: "Q. Tell the character of his injuries from your examination, and whether or not you think it is permanent. A. Yes, sir; I think it is. Q. Did you make an examination with the X-rays to ascertain whether or not the bones were sound? A. No, sir. Q. You predicate your opinion about the permanency of the injury upon the fact that it should turn out that the bone is diseased? A. I take it the bones were diseased from the fact of the time it has been healing. If there was no disease of the bone, it seems like it would heal. Q. You predicate your answer solely upon that? A. From the length of time and the appearance of the wound. Q. You don't know whether or not the bone is injured? A. No, sir; the symptoms indicate that by having a running sore for several months. Q. If there has been no injury to the bone, and no diseased condition of the bone, do you think it will not heal? A. If there is no disease of the bone, that flesh wound will heal; yes, sir."

For appellant the two physicians who treated appellee were introduced, and testified that they made an examination of appellee's foot with the X-rays, and in answer to questions said: "Q. I will ask you whether any of the bones of his foot or ankle or leg are broken or affected. A. No, sir; they are not. Q. Tell the jury how you know it? A. Well, simply by examination; from the examination at the time of the accident, and while the wound was fresh. Q. Have you ever examined it with the X-rays? A. Yes, sir; examined it with the X-rays, and I also asked Dr. Nisbet to examine it with them. Q. Did both of you examine it with the X-rays? A. Yes, sir. Q. Is there any injury at all to the bone? A. No, sir; there is not. Q. What was the nature of the wound, that causes it to be so long healing? A. It was a flesh wound, and considerable bruise; the muscles torn, and the skin considerable bruised, and a tear and laceration also." These doctors also testified in substance and effect that his in-

juries were temporary. It will be observed that the physician who testified for appellee made only one examination, and that without using the X-rays, and his conclusion that the foot was permanently injured was based on the fact that in his opinion the bones of the foot were diseased; while the physicians who treated him for the injury, and who examined his foot frequently and with the X-rays, say that the bones are not injured, and that in time the foot will be restored to its normal condition.

We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent. The fact that the negligence was gross, and that punitive damages were allowed, and that appellee was entitled to more than mere compensation for his mental and physical suffering, does not imply that a jury are at liberty, unrestrained, to award by way of punitive damages any amount, however large it may be. This court has the same power and discretion to set aside a verdict, when excessive, in cases involving punitive damages as it has where only compensation is recovered. In every case, if the verdict appears to have been given under the influence of passion or prejudice, a new trial will be granted. L. & N. R. R. Co. *v.* Long, 94 Ky. 410, 22 S. W. 747; Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595. As was said by this court in Louisville Railway Co. *v.* Minogue, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378: "It is impossible to measure with anything like absolute certainty the amount of punitive damages proper in a case, or the extent of some of the elements of those which are compensatory. The opinion of a jury has been, and properly, no doubt, regarded as the best means of even a fair approximation, and every verdict should be treated *prima facie* as the result of honest judgment upon their part. They are the constitutional triors of the facts of the case, and courts should exercise great caution in interfering with their verdicts. Litigants must not be left, however, to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy or unreasonable prejudice."

It will readily be conceded that it is peculiarly within the province of the jury to fix the amount of damage that a person is entitled to for mental and physical suffering, and will also be agreed that there is no rule by which the amount that should be awarded can be measured. For these reasons this court has always been reluctant to interfere with the finding of a jury upon the question of damages, and especially is this true when the injury is permanent, or of such a character as to disable the injured person from pursuing his usual occupation or employment, or one that will cause him to suffer serious pain probably through life. But, if appellee's foot should be fully restored, and there is a complete recovery, and he is placed in the same physical con-

dition as he was before the injury, it appears to us at first blush that the verdict is too large. The future effect of the injury should be shown with reasonable certainty to authorize damages upon the score of permanent injury.

For the error in the amount of damages, the judgment must be reversed, with directions for a new trial.

PITTMAN v. CHICAGO & E. I. R. CO.

(Supreme Court of Illinois, Dec. 17, 1907. Rehearing Denied Feb. 6, 1908.)

[83 N. E. Rep. 431.]

Trial—Unsustained Count—Right to Dismiss.—A motion to dismiss a count because it is unsustained by evidence is properly denied; the proper practice being to raise the question by presenting an instruction.

Master and Servant—Railroads—Death of Conductor—Proximate Cause.*—Where a conductor riding on a coal car was killed through the car being derailed by a defective track, that the engineer handled the cars negligently does not relieve the company from liability for its negligence respecting the track.

Appeal—Harmless Error—Instructions.—In an action against a railway company for death caused by a defective track, an instruction directing a verdict for the plaintiff, and stating as one element of the hypothesis of fact that the track was defective long enough to enable the company to have learned of the defect in ordinary diligence, if erroneous for failing to allow further time for repairs, was harmless error, where the company had actual knowledge of the defect and ample time in which to remedy it.

Master and Servant—Railroads—Action for Death—Instructions.—In an action against a railway company for death caused by a defective track, an instruction directing a verdict for plaintiff, and stating as one element of the hypothesis of fact that the track was defective long enough to have enabled the company, or its agents, whose duty it was to keep the track in repair, to have learned of the defect by using ordinary diligence, was not objectionable, because the record did not show what agent was required to keep the track in repair.

*See third foot-note appended to Stone v. Union Pac. R. Co. (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

For the other authorities in this series on the subject of concurrent negligence, see foot-notes appended to Smith v. Fordyce (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

Pittman *v.* Chicago & E. I. R. Co

Same—Conductor—Right to Rely on Engineer.†—A railway conductor was not guilty of contributory negligence in going upon a coal car, which was being switched onto a side track, and in relying upon the engineer to obey his stop signals, so as to prevent recovery for his death, caused partially by the engineer's failure to obey such signals.

Same—Actions—Instructions.—In an action against a railway company for death caused by the derailment of car on a defective track, an instruction directing a verdict for plaintiff was not prejudicially erroneous for failing to hypothesize the facts that he could not have known of the defect by exercising due diligence, and that he did not have equal means with the company of knowing thereof, where the evidence showed he did not have equal means to, and did not actually, know of the defect, his duty as conductor not including the inspection of tracks.

Appeal—Review—Estoppel to Allege Error.—The rule that one party cannot complain of the giving for the other of an instruction like one given for him does not prevent a defendant from complaining that an instruction directing a verdict for plaintiff, if the jury found certain facts, omitted facts essential to recovery.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Kankakee County; Frank L. Hooper, Judge.

Action by Blanche M. Pittman against the Chicago & Eastern Illinois Railroad Company for negligent death. From a judgment of the Appellate Court for the Second District affirming a judgment for plaintiff, defendant appeals. Affirmed.

W. R. Hunter and *H. T. Dick,* for appellant.
W. K. & H. H. Wheeler, for appellee.

CARTWRIGHT, J. On March 18, 1905, Harry M. Pittman was the conductor of a local freight train of the appellant, Chicago & Eastern Illinois Railroad Company, making trips each week day from Momence north to Dalton and back. He had a crew of an engineer, fireman, and three brakemen. On the morning of that day he went north as usual from Momence, and at Grant Park was required to set two cars on the side track—one, a car of coal, to be set by the side of the boiler room of the Curtis brickyard plant, and the other, a car of wood, to be left at a woodpile south of the boiler room. The main track ran nearly north and south, and the side track left the main track some

†For the authorities in this series on the question whether a person injured through the conduct of another had the right to assume that he had or would perform the duties owing to the person injured; or whether it was the duty of the injured person to anticipate negligence on the part of the other, see foot-notes appended to O'Brien *v.* St. Paul City Ry. Co. (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323.

distance south of the boiler room and curved to the east and then north and ran by the west side of the boiler room, in which there were windows through which the coal was to be shoveled. The track at the boiler room was elevated three or four feet above the natural surface of the ground, and it ended just north of the boiler room, at a bumping post. The two rails at the north end had been turned up and bent so as to come together, and were fastened to the post. About four weeks before that time the bumping post had been knocked out of place toward the northeast, which had pulled the west rail from its connection with the rail south of it. The rails had been fastened together at the ends with fish plates on each side and bolts running through the rails. Pulling the rails apart left a vacant space of three or four feet on the west side, and sticks of cord wood were thrown across the track in that space. Just west of this vacant space in the rail there was a water tank standing on posts near the track. The engine was headed north, and pushed five cars, with the car to be left at the boiler room in front, up quite a steep grade towards the boiler room. The engine was small, and at first was not able to push the cars up the grade. The engineer backed down for a fresh start, and after getting the sand box to working, made a second attempt, using all the force he could. Pittman was standing on the first coal car at the north end, and when about 200 feet from the bumping post he gave the engineer a signal to stop. There was not room on the side of the car next to the boiler room for a person to pass through, and he went forward on the coal car and got down on the west side, standing with one foot on the oil box and holding on to the side of the car. He gave repeated signals to the engineer to stop, and a brakeman was also energetically giving such signals, but the cars did not begin to slow down until within perhaps 150 feet of the bumping post, and they were still moving when they passed the boiler room. When the wheel on the west side struck the open space, the car left the track and turned toward the water tank on the west. The trucks were stopped, and the bumping post was knocked down, but the body of the car went 3 or 4 feet beyond the post. Pittman was caught between the side of the car and a post of the water tank and was killed. He left the appellee, his widow, and a child was born about 40 days after his death. Appellee was appointed administratrix, and brought this suit in the circuit court of Kankakee county to recover damages resulting from his death. Upon a trial there was a general verdict finding the defendant guilty and assessing the plaintiff's damages at $5,000, and a special finding that the deceased did not know of the condition of the track and bumping post before he started to place the cars at the boiler room. On appeal to the Appellate Court for the Second District the judgment was affirmed, and this further appeal was prosecuted.

At the close of the evidence for the plaintiff, and again at the close of all the evidence, the defendant moved the court to dismiss certain counts of plaintiff's declaration, and the motion was denied. There were seven counts in the declaration, which charged the defendant with liability on various grounds, and it is now contended that the court erred in refusing to dismiss all of the counts except those that charged that the track was defective and the rails pulled apart, for the reason that there was no evidence to sustain any of the counts except those making such charges. The only counts which the evidence tended to sustain were those which alleged that the rails were pulled apart and the track was thereby rendered unsafe, and when the motion was made the attorney for plaintiff stated that the only claim of liability was on account of the track being defective and out of repair for so long a time that the defendant, by the exercise of ordinary diligence, could have discovered the defect. The court, in overruling the motion to dismiss part of the counts, said that if, in the judgment of the attorneys for the defendant, the evidence was insufficient to support any particular count or counts of the declaration, they might present instructions raising that question as to such counts, and the attorneys did not present any such instruction. Counsel say that the provision of the practice act that the defendant may apply to the court to instruct the jury to disregard a faulty count or counts applies only to counts that do not state a good cause of action, but that the court ought to dismiss counts which are not sustained by evidence. The first part of the proposition is correct; but there is no practice by which the court is either authorized to dismiss counts of a declaration or to instruct the jury orally respecting them. A plaintiff may dismiss a suit, or withdraw a count or counts; but the court is not authorized to dismiss particular counts, and can only dismiss the suit for want of jurisdiction, want of prosecution, disobedience to some order of the court or for some other recognized cause. If there is no evidence fairly tending to prove the cause of action alleged in a particular count or counts, so that a judgment based thereon could not be sustained for want of evidence to support it, the proper practice is to present a written instruction to the court, which it would be the duty of the court to give. The court did not err in denying the motion.

Counsel next argue that the condition of the track was not the proximate cause of the accident, which is a question of fact finally settled by the judgment of the Appellate Court. If the engineer, as a matter of fact, was guilty of negligence in the rate of speed and the manner in which he handled the cars, it would not relieve the defendant from liability for its negligence in respect to the track. Negligence of the engineer concurring with that of the defendant would not bar a recovery. Pullman Palace Car Co.

v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Chicago & Northwestern Railway Co. *v.* Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117.

But one instruction was given at the request of the plaintiff, and it directed a verdict finding the defendant guilty if the jury should find the facts therein stated to have been proved by a preponderance of the evidence. The instruction was quite lengthy, and it is criticised by counsel in many particulars. One objection made is, that it stated as one element of the hypothesis of fact that the track was defective or unsafe for so long a space of time as would have enabled the defendant, or its agents whose duty it was to keep said track in repair, to have learned of such defect by the use of ordinary diligence, and did not allow further time to make repairs. It is argued that the correct rule was not stated, for the reason that after the defendant had notice the law permitted such further sufficient time to elapse as would enable the defendant to notify the proper employee and make the repairs before liability would attach. Counsel are right as to the rule; but in this case the liability did not rest on constructive notice from the lapse of time, but rested upon actual notice, and it is immaterial whether the instruction was technically right or not. The uncontradicted evidence was that the track was out of repair and in the condition stated for some weeks; that the station agent had actual notice of its condition; that new rails had been procured to make repairs and had been lying at the station, on the platform, for about a week. There was actual knowledge and ample time to remedy the defect, and if the instruction did not exactly fit the case, it did no harm. A further objection made to that part of the instruction is that nowhere in the record does it appear what agent was required to keep the track in repair; but, so far as we can see, that is a matter of indifference.

The instruction required the jury to find that the deceased was in the exercise of due care, but it is objected to as limiting such care to the time while he was on the coal car. It is said that if the engineer had obeyed the signals and stopped the engine no injury would have resulted, and that the deceased was negligent in going on the car and placing himself in a position where his safety depended on the engineer. He surely had the right to suppose that the engineer would obey his signals, and if he could never put himself in a position where his safety depended on the care and discretion of the engineer, he would have had to keep off the train entirely, which neither the law nor any rule of the defendant contemplated. There would be no time in the operation of the train when the conductor would not be dependent on the engineer and on his obedience to orders.

The principal objection to the instruction is that it omits the material facts that the deceased could not have known of the condition of the track by the exercise of due diligence, and that

he did not have equal means with the defendant of knowing that the track was defective. The instruction required the jury to find that the deceased had no knowledge of the defective and unsafe condition of the track, and the jury made the special finding, before stated, that he did not have such knowledge. Two witnesses testified for the defendant that three or four days before the accident the deceased asked the station agent when he was going to get the bumping post repaired, but there was much evidence that he knew nothing about it, and the controverted question of fact has been settled by the judgment of the Appellate Court. His duty as conductor did not include the inspection of tracks, and if the instruction had contained the condition contended for—that the deceased could not have known of the condition of the track by the exercise of due diligence—it would have been misleading without an explanation as to what would constitute such diligence and that he had no duty of inspection. Under the evidence the jury could not have found that he had the same opportunity to know of the defect that defendant did. Even if he knew several days before the accident that the bumping post was leaning over, it does not follow that he knew of the opening in the rail; nor does it follow that he did not suppose, or had a right to suppose, that the repairs had been made. The rails for that purpose had been at the station for a week or so, and he might well have presumed that they had been put in place.

Counsel for appellee say in relation to this objection that the defendant procured instructions to be given containing the same omission, and therefore is not entitled to complain of this one. One party cannot complain of an instruction given on behalf of the opposite party which is like one given at his own request. But that rule does not apply to the instructions in this case. The instruction in question directed a verdict, and would be fatally defective if it omitted any controverted fact essential to a recovery. Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 125. The instructions given at the request of the defendant told the jury that the plaintiff could not recover unless she had proved certain material facts, but they did not undertake to include all the necessary facts. If some material fact necessary to a recovery was not proved, the defendant had a right to an instruction that there could be no recovery in the absence of such proof, without mentioning other facts, and such instructions do not cure a defect in one which purports to state all facts which authorize the judgment. In view of the evidence, the jury could not have found differently as to the omitted fact, and therefore the verdict was not influenced by it, and the instruction was not harmful.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MISSOURI PAC. RY. CO. *v.* BRINKMEIER.

(Supreme Court of Kansas, April 3, 1906. On Rehearing, Jan. 11, 1908.)

[93 Pac. Rep. 621.]

Railroads—Equipment—Safety Appliance Act.*—A railway company doing business as a common carrier, engaged in interstate commerce, has complied with the requirements of the act of Congress relating to safety appliances, enacted March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], and its amendments of 1903, being chapter 976, Act March 2, 1903, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), when it equips its cars with automatic couplers as prescribed by said act, and it will not be thereafter subject to the conditions imposed by section 8 of such enactment (27 Stat. 532 [U. S. Comp. St. 1901, p. 3176]) on account of subsequent defects occurring to the couplers, which ordinary care and diligence could not have avoided.

Same—Petition—Evidence—Interstate Commerce.—A petition contained an averment which reads: "The Missouri Pacific Railway Company is and was at all the times hereinafter mentioned a corporation, * * * doing business as a railway company as a common carrier in, into, and through the counties of Sedgwick and Reno, in the state of Kansas, and into the states of Colorado, Nebraska, Missouri, Arkansas, Texas, Oklahoma, and Indian Territory." Held, that it was not error to admit evidence thereunder showing that such railway company was engaged in interstate commerce.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Henry Brinkmeier against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

See 77 Pac. 586.

J. H. Richards, C. E. Benton, and *Smyth & Helm,* for plaintiff in error.

C. V. Ferguson (Kos. Harris, V. Harris, E. A. Moseley, and *L. M. Walter,* of counsel), for defendant in error.

GRAVES, J. Henry Brinkmeier, the defendant in error, commenced this action in the district court of Sedgwick county against

*For the authorities in this series on the subject of the application of, and compliance with automatic coupler acts, see foot-notes appended to Southern Ry. Co. *v.* Simmons (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

the plaintiff in error to recover damages for personal injuries received while in its employment as brakeman. He recovered a judgment for $6,500, and the railway company brings the case here for review. The controlling facts are not seriously disputed. The controversy arises principally upon the construction of sections 2 and 8 of the act of Congress, enacted March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531, 532 [U. S. Comp. St. 1901, pp. 3174, 3176]), and entitled "An act to promote the safety of employees and travelers upon railways by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes." These sections read:

"That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of cars.

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

This law was amended March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), the amendment after title and preliminary clause reads: "* * * The provisions and requirements hereof, and of said acts relating to train brakes, automatic couplers, grab irons, and the heighth of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * in connection therewith. * * *"

It is urged that the petition does not state a cause of action under this law; that in it there is no averment that the car which inflicted the injury was being used in moving interstate traffic, nor any statement equivalent thereto; that there are no facts stated therein which suggest a violation of this federal statute, but, on the contrary, they clearly indicate that the pleader intended to state an ordinary case of negligence. The petition contains an allegation which reads: "The Missouri Pacific Railway Company is and was at all the times hereinafter mentioned a corporation legally existing and doing business under and pursuant to the law of the state of Missouri, and doing business as a railway company as a common carrier in, into, and through the counties of Sedgwick and Reno, in the state of Kansas, and into the states of Colorado, Nebaska, Missouri, Arkansas, Texas, Oklahoma, and Indiana Territory." Under this averment proof

that the defendant was engaged in interstate commerce might be properly introduced. It is unnecessary to specifically mention this act of Congress in a cause of action predicated thereon. It is sufficient if the pleading contains facts which would suggest to a person familiar with such act that its provisions had been violated. Voelker *v.* C., M. & St. P. Ry. Co. (C. C.) 116 Fed. 867. All the coupling appliances of every railway company engaged in interstate commerce are subject to the provisions of this statute, and when it is shown that such a railroad company had a defective automatic coupler in use on one of its cars the additional averments necessary to state a cause of action are practically the same as those required in an action of ordinary negligence. We are unable therefore to hold that the petition was fatally defective as against this objection, which appears to have been first specifically presented in this court. It is expressly admitted that the car in question was engaged at the time of the injury in moving interstate traffic, and is therefore clearly within the provisions of this statute.

There is a sharp controversy between the parties as to what constitutes a compliance with section 2 of the federal statute, hereinbefore quoted. It is insisted by the defendant in error that every car used in interstate traffic must be equipped with the prescribed appliance, and at all times thereafter be in proper repair. If because of any defect therein an employee is injured, the railway company will incur the burden imposed by the provisions of section 8, however diligent it may have been in an effort to discover and repair the defect. On the other hand, it is urged that, when a car is once supplied with the appliance as required by law, the company will not in case of injury be subject to the provisions of section 8, unless it has been negligent with reference to keeping such appliance in repair. The facts upon which this controversy depends, briefly stated, are these: The plaintiff was injured while attempting, as a brakeman, to couple one car to another, each of which was equipped with an automatic coupler. One of the couplers was not in repair, being out of its proper position, and turned so that it would not properly meet the one of the other car. The brakeman while attempting to adjust the defective coupler so as to make the coupling got his foot between the couplers and received the injuries of which he complains. About a year prior to the injury the company received the car having the defective appliance, at which time the coupler was in perfect condition. When it became defective does not appear. So far as the evidence shows, the plaintiff was the first person to notice it, and he made the discovery immediately before attempting to make the coupling. Upon these facts the trial court gave the jury instructions which read: "You are instructed that under such act it was the duty of the defendant railway company, not only originally to equip

its cars with automatic couplers, as required by said act, but also to keep them in proper condition so that they could at all times be coupled or uncoupled without the necessity of men going between the ends of the cars to assist in coupling or uncoupling them. And the railway company was bound to know at its peril that the coupler attached to the car in question was in proper working condition, and the fact that the defendant company may not have known of its defects or defective condition, if you find that it was defective, does not in any manner excuse its unlawful use. You are further instructed that, if you find the plaintiff has established his injuries, and you find the coupler would not couple automatically by impact, he is entitled to recover for his injury, unless you further find that the plaintiff was negligent in the premises which directly contributed toward his injury."

Under our construction of the statute these instructions are erroneous: They impose a materially greater burden upon common carriers than the law contemplates. The duty prescribed by them cannot be found in the express language of the statute, and therefore must have been placed therein by construction. If the language is open to construction, then it must be construed so as to fairly carry out the Legislative intent as described by the act. United States *v.* So. Pac. Ry. Co. (D. C.) 135 Fed. 122; United States *v.* Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080. In this connection it is proper to consider briefly some of the conditions which led up to the enactment of this statute. During the year ending June 30, 1891, 47 different styles of car couplers were in use, and during that year 2,660 employees were killed and 26,140 injured. Interstate Commerce Commission Report 1891. In the messages of President Harrison of 1889, 1890, 1891, and 1892 he urged the necessity of congressional action to ameliorate this wholesale destruction of human life. In his message of 1891 he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." March 2, 1893, this law was enacted. These facts, the preamble, context, and subject-matter of the act indicate with reasonable clearness that the real point aimed at by the statute was to eliminate from railroad service the old homicidal link and pin and the 46 other dangerous devices then used for coupling cars and compel the adoption of a uniform class of couplers which would reduce the loss of life among railroad employees to the mimimum. In the case of Johnson *v.* So. Pac. Ry. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed.

363, Fuller, C. J., in speaking upon this subject, said: "The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars." In the administration of this law its manifest object should be recognized and promoted by giving full force and effect to its salutary and beneficial provisions. In the performance of this duty, however, courts cannot indulge in rules of construction which change the meaning of the law from what its framers contemplated, nor which make its requirements impractical, unreasonable, or impossible to perform. In our view, the law is satisfied as to any specific car, whenever that car has been supplied with the prescribed appliance. Whenever an automatic coupler, such as the act of Congress requires, is attached to a railway car, it stands in the same category as all other appliances and instrumentalities used by railway companies. Thereafter it is the duty of the company to use reasonable and ordinary care and diligence to keep this and all other equipments in good repair and safe condition for the use of its employees, and a failure to do so constitutes negligence. This was the law before the act of Congress was passed, and that act did not change the law in this respect. It seems reasonable to assume that, if Congress had intended to impose a special duty upon common carriers to keep a particular appliance in repair, not applicable to all, such intent would have been expressed in clear and specific terms. The constuction given to this statute by the instructions of the trial court impose conditions which seem to be unreasonable and in some instances would be impossible to perform. Every railroad appliance must inevitably wear out, break and become defective, and no degree of foresight can anticipate the time when repairs will be needed. Any appliance, especially couplers, may get out of repair while cars are being moved in the yards, or on side tracks in making up a train, or while moving in a train between stations. Railroad companies are compelled to rely for information concerning defects in their appliances almost wholly upon the employees who use them. Necessarily it takes time to make repairs. No degree of diligence within the limits of a reasonable possibility would be sufficient to enable a railroad at all times and under all circumstances to keep its car couplers in such a state of repair as would prevent a brakeman disposed to encounter danger, as the plaintiff did in this case, from receiving injury. So far as the evidence shows, the coup-

ler in question in this case may have been thrown out of place by a jam received immediately before the plaintiff discovered it, in which case it would have been impossible for the company to have known of and repaired the defect. Statutes should not be extended by constructions so as to produce such unreasonable results.

No case has been cited which can be regarded as an authority in support of the construction insisted upon. In case of U. S. *v.* So. Pac. Ry. Co. (D. C.) 135 Fed. 122, this question is discussed, and the opinion seems to sustain the view here contended for by the plaintiff; but in that case it was found by the court that the railroad company had been guilty of gross negligence in not discovering and repairing the defect which caused the injury. This makes the discussion wholly unnecessary to the decision of the case, and weakens its force as an authority. This decision was considered by the United States District Court of Colorado quite recently, in the case of United States *v.* A., T. & S. F. Ry. Co., 93 Pac. —, in which it is said that the conclusion there reached is exceptional, a departure from the general and better rule, and has been sharply criticised. In the case last cited the court said: "These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railroad companies to use prudence and the ordinary diligence of a business man, keeping in view the purpose of this act, to keep these couplings in repair. The act construed in an intelligent and practical way would not impose on the railroad company the absolute duty every instant to have this coupling so that it would work automatically. If a coupling is out of repair, and the railway company handling the car then uses ordinary and reasonable care, considering the facilities at hand to repair the coupling and put it in repair, so that it would comply with the act, then it is not liable." We think the position of the Colorado court more reasonable and less liable to lead to impractical results. The burden of proof was upon the plaintiff to show that the defendant was negligent in having this defective appliance in use. Upon this question there is a total failure of proof. The car was placed at the saltworks two days before the injury. It was brought from there in charge of the plaintiff as brakeman. He did not discover this defect until immediately prior to the accident. There is no evidence as to when the car was last inspected, and nothing whatever appears to indicate negligence on the part of the defendant.

The jury were told by the instructions of the court that if the coupler was defective, and the plaintiff was thereby injured, a verdict against the defendant would be proper regardless of whether it had been negligent or not. This was erroneous.

The judgment is reversed, with direction to grant a new trial and proceed in accordance with the views herein expressed. All the Justices concurring.

On Rehearing.

GRAVES, J. After the opinion had been filed in this case, the Interstate Commerce Commission requested that a rehearing be granted and that it be permitted through special counsel to present an argument, both oral and printed, upon the questions involved in the case. The defendant in error joined in this request. Appreciating the deep interest taken by this national tribunal in all cases arising under the provisions of the safety appliance statute, and being anxious to receive all the light possible upon the questions involved, the rules applicable to ordinary actions were waived and the request granted. At the rehearing extended arguments and citation of authorities were presented. We have carefully examined the briefs and decisions submitted, and have reconsidered the questions discussed, but are unable to accept the contention of defendant in error as to the meaning of the federal statute when applied to the facts of this case, and therefore adhere to the opinion heretofore filed.

In the argument our attention was called to a question which was overlooked when the case was decided. It was urged before, and is insisted upon now, that the safety appliance act should not be considered, for the reason that the plaintiff's petition does not allege a violation of any of its provisions. The force of this position is found in the following facts: The injury complained of was received November 12, 1900. At that time section 2 of this statute prohibited railroad companies from hauling any car used in moving interstate traffic and not equipped with the appliance required. In 1893 the law was amended so as to make its provision apply, not to a car used in moving interstate traffic merely, but to all trains or cars used on any railroad engaged in interstate commerce. The petition does not allege that the car which caused the injury was being used in moving interstate traffic. It is therefore insufficient under the law as it stood when the injury occurred. It was held to be sufficient, however, because it contained averments which, by a very liberal construction, could be said to allege that the car by which the injury was inflicted constituted a part of a train owned and operated by a railroad company engaged in interstate commerce, which made it sufficient under the law as amended some three years after the cause of action accrued. The importance of these dates was not clearly indicated in the first argument, and was overlooked when the case was first considered. The plaintiff in error was entitled to a reversal of the judgment upon this ground alone, and the case might have been so decided if these facts had been clearly presented. We are satisfied, however, with the position taken in the opinion, and still adhere to it.

In view of the foregoing facts, we now place the judgment of reversal both upon the ground that the petition does not state a cause of action under the statute and because the trial court erred in its instruction to the jury.

CRYDER *v.* CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, March 19, 1907.)

[152 Fed. Rep. 417.]

Master and Servant—Latent Defects—Failure to Discover and Remove Not Negligence of Master.*—The failure of a master or of his inspectors to discover and remove latent defects, which the exercise of ordinary care would not discover, in the place, articles, or machinery with which his servant works, is not negligence on their part, because the discovery and removal of such defects falls beyond the limits of their duty to exercise reasonable care.

Same—Servant Assumes Risk.†—The servant assumes the risk of the latent defects in the place, articles, and machinery with which he works, which the ordinary care of the master to make and keep the place, articles, and machinery reasonably safe fails to discover and remove.

Same—Negligence—Proof of Injury by Negligence or by Some Other Cause Insufficient.‡—Evidence in actions for negligence that

*For the authorities in this series on the question of the degree of care required of a railroad, as an employer, in inspecting appliances, see foot-notes appended to Shandrew *v.* Chicago, etc., Ry. Co. (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; foot-notes appended to Gulf, etc., R. Co. *v.* Larkin (Tex.), 19 R. R. R. 235, 42 Am. & Eng. R. Cas., N. S., 235; Wood *v.* Southern Ry. Co. (Va.), 19 R. R. R. 19, 42 Am. & Eng. R. Cas., N. S., 19.

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to Gulf, etc., Ry. Co. *v.* Huyett (Tex.), 22 R. R. R. 637, 45 Am. & Eng. R. Cas., N. S., 637; foot-notes appended to Arenschield *v.* Chicago, etc., Ry. Co. (Iowa), 22 R. R. R. 41, 45 Am. & Eng. R. Cas., N. S., 41; Kennedy *v.* Kansas City, etc., R. Co. (Mo.), 21 R. R. R. 818, 44 Am. & Eng. R. Cas., N. S., 818; foot-notes appended to Graham *v.* Chicago, etc., R. Co. (Tex.), 21 R. R. R. 549, 44 Am. & Eng. R. Cas., N. S., 549; Farney *v.* Oregon Short Line R. Co. (Utah), 21 R. R. R. 529, 44 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to Anderson *v.* Northern Pac. Ry. Co. (Mont.), 21 R. R. R. 23, 44 Am. & Eng. R. Cas., N. S., 23; Mumford *v.* Chicago, etc., Ry. Co. (Iowa), 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431; Ives *v.* Wisconsin Cent. R. Co. (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; Western Ry. *v.* Russell (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225; Root *v.* Kansas City So. Ry. Co. (Mo.), 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; foot-notes appended to Drake *v.* San Antonio & A. P. Ry. Co. (Tex.), 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157.

‡For the authorities in this series on the subjects of the burden of proof and presumption of negligence, in actions against employers for injuries to their employees, see foot-notes appended to Stewart *v.* Raleigh, etc., R. Co. (N. Car.), 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to Norfolk & W. Ry. Co. *v.*

the injury was caused by the defendant's want of reasonable care, or by a latent defect, or by some other thing for which he is not responsible, is insufficient, because the burden is on the plaintiff to show that the injury resulted directly from the negligence of the defendant.

Same—Negligence—Latent Defects—Facts—Conclusion.—A conductor was descending a ladder on the end of one of the cars of his moving train, when one end of one of the rounds gave way, and he fell and was injured. The car had been cornered, and this was one of five of the six rounds of the ladder which had been bent. The defendant had provided inspectors to examine this and other cars at the station at which the conductor took this train and to cause defects in them to be remedied. After the accident one end of the wood screw which fastened the round which gave way was found newly broken at a point from an inch to an inch and a half within the wood of the car.

Held, there was no substantial evidence here of negligence of the defendant or of its inspectors.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

W. S. Roark (*Lee Monroe* and *W. F. Schoch,* on the brief), for plaintiff in error.

Paul E. Walker (*M. A. Low,* on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judge.

SANBORN, Circuit Judge. The plaintiff was a conductor in the employment of the defendant, a railroad company. About midnight on July 5, 1903, he took his train at Horton, in the state of Kansas. After he had passed two or three stations he went forward on the top of the train until he came to a furniture car. He then attempted to descend on a ladder made of iron rounds about three-quarters of an inch in diameter fastened to the end of this car by wood screws, and, as he placed his hand or foot upon one of them, one end of it gave way, he fell, and was injured by the moving train. The company had furnished inspectors at Horton whose duty it was to examine this and other cars before they were delivered to the conductors and to use reasonable care to cause those found dangerously defective to be repaired. The furniture car had been cornered, and five of the six rounds of the ladder from which the plaintiff fell had

McDonald's Adm'x (Va.), 22 R. R. R. 101, 45 Am. & Eng. R. Cas., N. S., 101; foot-notes appended to Vissman *v.* Southern Ry. Co. (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; St. Louis, etc., R. Co. *v.* Hill (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20.

been bent. After the accident one end of one of the rounds of the ladder was found to be loose and hanging by the other end. In the loose end of this round was one end of a wood screw, which had fastened it to the car, newly broken. This screw was about four inches long, and it had broken from an inch and a half within the wood of the car. Upon this state of facts the court sustained a demurrer to the evidence, and this ruling is challenged by the writ.

When one brings an action for damages on account of the negligence of the defendant, he assumes the burden of proving that the defendant was guilty of some breach of duty which caused the injury. The primary legal presumption in such a case is that the defendant and all who were charged with the performance of any part of his duty as a master have properly discharged their respective duties; that the defendant had exercised reasonable care to provide ordinarily safe cars, engines, and rails, and to furnish competent inspectors to examine and keep them in a reasonably safe condition; and that these inspectors have properly discharged their duty.

The breach of duty upon which the plaintiff relied in this case was the alleged failure of the inspectors at Horton to carefully examine and by that examination to discover, and cause a remedy of the defects in the screw, the break of which caused the accident. But the limit of the duty of the inspectors was to exercise ordinary care to examine the car and to remedy the defect, to exercise that degree of care which ordinarily prudent inspectors commonly use under like circumstances. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 411, 416, 12 Sup. Ct. 679, 36 L. Ed. 485; Southern Pacific Co. *v.* Hetzer, 68 C. C. A. 26, 35, 135 Fed. 272, 281, 1 L. R. A. (N. S.) 288. The only evidence to overcome the legal presumption that they discharged this duty is the fact that the car had been cornered, and five of the rounds of the ladder had been bent, the fact that the screw broke, and the accident itself. But four of the five bent rounds held fast, so that their crooked condition constituted no notice or evidence to the inspectors that the screw in question was broken or that it would break.

A new fracture of the screw occurred an inch or an inch and a half within the wood of the car. But this fact fails to overcome the presumption that the inspectors discharged their duty, because the weakness of this screw may have been a latent defect which a reasonably careful inspection of the car would not have disclosed, and the servant assumes the risk of such defects.

The plaintiff was injured by the break of the screw. But the facts that the screw gave way, and that the plaintiff was thereby injured, are insufficient to establish the negligence of the inspectors or of the defendant, because they do not show whether the injury was caused by negligence in inspection or by a latent

defect, and proof that it was caused by the former, and not by the latter, was indispensable to overcome the presumption that the inspectors exercised reasonable care to examine the cars. The doctrine *res ipsa loquitur* is inapplicable to cases between master and servant brought to recover damages for negligence. Patton *v.* Texas & Pac. R. Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Chicago & N. W. Ry. Co. *v.* O'Brien, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598; Northern Pac. R. Co. *v.* Dixon, 139 Fed. 737, 740, 71 C. C. A. 555, 558.

The servant assumes the ordinary risks and dangers of his employment which are known to him and those which would be obvious to one of ordinary prudence in similar circumstances. One of these risks is that which arises from latent defects, which the ordinary care of the master may not discover, in the place, articles, and machinery with which the servant works. The failure of the master to find and remove such latent defects, which ordinary care is unable to discover, constitutes no negligence on his part, because the limit of his duty is to exercise reasonable care, and the discovery and repair of such defects falls without that limit. Illinois Cent. R. Co. *v.* Coughlin, 132 Fed. 801, 802, 65 C. C. A. 101, 102; Hodges *v.* Kimball, 104 Fed. 745, 753, 44 C. C. A. 193, 201; Killman *v.* Robert Palmer & Son, etc., Ry. Co., 42 C. C. A. 281, 102 Fed. 224; Carruthers *v.* C. R. I. & P. Ry. Co., 55 Kan. 600, 605, 40 Pac. 915; Allen *v.* Union Pac. R. Co., 26 Pac. 297, 298, 7 Utah, 239; Atchison, T. & S. F. R. Co. *v.* Wagner, 33 Kan. 660, 666, 7 Pac. 204.

There was no substantial evidence that the injury involved in this case was caused by any negligence of the defendant, and the court below properly directed a judgment in its favor.

No opinion is expressed upon the other alleged errors assigned, because, if the rulings challenged were erroneous, it is clear beyond doubt that no prejudice resulted or could have resulted to the plaintiff on their account. He could not have recovered if these rulings had been otherwise, for he was permitted to introduce all the evidence of causal negligence which he offered, it was insufficient to establish the liability of the defendant, and without proof of that liability he could not have secured a judgment in any event. Smiley *v.* Barker, 83 Fed. 684, 687, 28 C. C. A. 9, 12; Bank of Havelock *v.* Western Union Tel. Co., 141 Fed. 522, 527, 72 C. C. A. 580, 585, 4 L. R. A. (N. S.) 181.

The judgment below is affirmed.

PEARSALL *v.* NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, Nov. 19, 1907.)

[82 N. E. Rep. 752.]

Master and Servant—Injury to Servant—Fellow Servants.*—A locomotive engineer is a co-servant of the fireman and of an employee in charge of a switch and semaphore signals, and the employer is not liable in a common-law action for injuries received by the engineer in consequence of the negligence of the fireman or employee.

Same—Contributory Negligence—Question for Jury.—Whether a locomotive engineer injured by the derailment of his train by a misplaced switch was guilty of contributory negligence held, under the facts, for the jury.

Same—Burden of Proof.†—In an action against a master for injuries to a servant, the burden is on the plaintiff to show some act or omission by the defendant that caused or contributed to the accident.

Appeal—Decisions of Intermediate Courts—Questions Reviewable.—Where the decision of the court below is not unanimous, the sufficiency of the evidence is reviewable in the Court of Appeals.

Master and Servant—Adoption of Rules for the Safety of Servants—Negligence.‡—On the issue of the negligence of a railroad in failing to adopt rules for the protection of its servants, the question is not whether the rules adopted are the safest that could be devised for guarding against accidents, but whether the rules in force are reasonably sufficient, when observed, to protect the servants.

Same—Injury to Servants—Negligence—Evidence.—In an action against a railroad for injuries to an engineer by the derailment of his train by a misplaced switch, evidence examined, and held insufficient to show negligence of the company in failing to adopt rules guarding

*For the authorities in this series on the question whether a locomotive engineer is a vice principal or a fellow servant with respect to other employees of his company, see foot-notes appended to Bradford Construction *v.* Heflin (Miss.), 24 R. R. R. 483, 47 Am. & Eng. R. Cas., N. S., 483.

For the authorities in this series on the question whether switchmen are fellow servants of trainmen, see foot-notes appended to Howard *v.* Chesapeake & O. Ry. Co. (Ky.), 18 R. R. R. 842, 41 Am. & Eng. R. Cas., N. S., 842.

†See foot-notes appended to Southern Ry. Co. *v.* Carr (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

‡For the authorities in this series on the subject of the duty of a railroad to make and promulgate rules for the guidance and protection of its employees, see foot-notes appended to Louisville & N. R. Co. *v.* Vincent (Tenn.), 22 R. R. R. 415, 45 Am. & Eng. R. Cas., N. S., 415; Morrison *v.* San Pedro, etc., R. Co. (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690.

against accidents, but to show that the accident was due either to the blunder of the fireman or of the employee in charge of the switch and the semaphore signals.

Same—Rules—Sufficiency.‡—Negligence cannot be imputed to a railroad company on the sole ground that it failed to adopt the same methods for operating its road that other roads had in use, since, before it can be said that the plan of the other roads is the safest, it must be shown that the conditions are the same, and that the result of experience is in favor of their methods.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by David A. Pearsall against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (97 N. Y. Supp. 1143, 112 App. Div. 904), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

A. H. Cowie, for appellant.
A. D. Jenney, for respondent.

O'BRIEN, J. The plaintiff was seriously and permanently injured on the 12th of September, 1901, at about 2 o'clock in the morning of that day, by the derailing of the train upon which he was the engineer at a place called Eastwood, a few miles east of Syracuse, on the West Shore Railroad, which constituted a part of the defendant's system. The train was westbound, a fast express, in charge of the plaintiff as engineer, and, after crossing a bridge east of the point where the accident occurred, was running at the rate of 40 or 50 miles an hour. The primary cause of the derailment and consequent injury to the plaintiff was that a switch, connecting a cross-over with the main passenger track on which the plaintiff's train was running at high speed, was not set or locked for the main track, but for the crossing.

The principal use and purpose of this diagonal crossing was to enable the defendant to transfer freight trains from the West Shore Road to the Central, and it led off in an easterly direction to the defendant's great yard at De Witt, where connection was made with the main track of the Central. The switch was usually kept set for this cross-over track, as there was very heavy traffic upon it. If the switch at this crossing had been set for the main track, instead of for the crossing, the accident would not have happened. The defendant had a switchman at the crossing, whose business it was to change the switch for the main track when necessary, and to properly operate the semaphore signals, intended to give notice to trains on the main track when it was safe to go on and when there was danger. The plaintiff, when approaching the point where the accident occurred, did not himself look out

‡See foot-note on preceding page.

from his engine in order to see whether the signals reported danger or safety, but left that duty to the fireman who reported to him that all was right. The plaintiff's reason for not looking out for himself was that he was rounding a curve at the time, and, it being necessary that he should be on the right of the engine, the smokestack, locomotive, barrel of the engine and headlight obstructed his vision so that he could not see the danger signal on the semaphores until it was too late to stop the train. If the accident resulted from the blunder of the fireman in reporting to the plaintiff that all was right when danger was obvious, or from neglect on the part of the operator who had charge of the switch and the semaphore signals, they were co-servants for whose negligence the defendant is not liable; this being a common-law action. There was no claim that these men were incompetent, or that the switch or semaphores were improperly constructed, or located, or that there was any defect in the signals, or, if there was, that the defendant had notice of the defect in time to repair it or cure the defect. The trial court, in substance, so instructed the jury. The finding of negligence cannot be supported by the proof on any of these features of the case. The defense of contributory negligence on the part of the plaintiff, in view of all the circumstances, the speed of the train, the condition of the track rounding the curve after a rain, the darkness of the night, and the assurance of the fireman that all was right, could not be ruled against the plaintiff as matter of law. We are inclined to think that the conduct of the plaintiff in failing to look out and observe the danger signals himself, instead of leaving that duty to the fireman, and in not stopping the train in time to avoid the accident, presented a question for the jury on the issue of contributory negligence.

The difficulty with the plaintiff's case is the absence of any proof of negligence on the part of the defendant. The burden was upon the plaintiff to give proof of some act or omission on the part of the defendant that caused or contributed to the accident. Since the decision of the court below was not unanimous, the question whether there was any evidence to support a finding of negligence on the part of the defendant is open for review in this court. The learned counsel for the plaintiff, as I understand his argument, rests that feature of his case entirely upon the neglect or omission of the defendant to enact and promulgate some rule that, if executed or followed, would have prevented such an accident, and that was the question which the learned trial judge submitted to the jury. It was left to the jury to say whether the rules in force by the defendant to guard against such accidents at the crossing in question were sufficient, or whether some other and better rule could not have been devised by the defendant in order to conduct its business at the point in question with a greater degree of safety. The rule which the

learned counsel for the plaintiff insists should have been adopted by the defendant is formulated in his printed argument as follows: That switches should be required "to be kept locked and set right for the main track at all times, and that, whenever it was necessary for any train to cross over across the main track to any side track or connection, they may do so provided no passenger train be due, and that a flagman be sent in both directions so as to properly protect any approaching train." There was evidence given to the effect that the same, or a similar rule, had been adopted and was in operation upon other railroads in this state. The defendant's answer to this contention is substantially this: That the track crossing the main track at this point was used much more than the main track, and that its system of semaphore signals and the block system was equivalent to and safer than the system contended for by the plaintiff, and that different roads had different systems for the accomplishment of the same purpose of safety. Comparing the rule contended for by the plaintiff with that in force by the defendant at the time of the accident, it will be observed that its successful operation to avoid accidents is made to depend much more upon the vigilance and fidelity of the switchman and flagman, and much less upon the fixed and permanent signals from the semaphores, known to the plaintiff and other employees as indicating danger or safety.

But the real question is, not whether the defendant adopted by its rules the safest plan that could be devised for guarding against accidents, but whether the rules in force were reasonably sufficient, when observed, to protect its servants from such accidents as resulted in personal injury to the plaintiff in this case. The accident occurred for the reason that the switch was set right for the cross-over track and wrong for the main track upon which the plaintiff's train was running. This situation could be known to all by a system of signals from the semaphores, which the rules prescribed. A red light was a danger signal and a white light a signal of safety. On the night in question the semaphore on the main track east of the crossing displayed a red light, and the semaphore for the cross-over track displayed a white light, indicating that the switch was set right for the cross-over, and hence safety for trains on that track, but wrong for the main track, and hence danger for the plaintiff's train. It cannot be doubted that, if these signals had been observed and acted upon by the defendant's servants, the accident could not have happened, since it was the plaintiff's duty to stop his train until the danger was over by a proper adjustment of the switch for the main track. While the semaphore on the main line was set against the plaintiff's train, the fireman claimed that the red glass on the arm did not entirely cover the light, so that the real situation could not be plainly seen. If it be true that the red glass did not entirely

cover the white light, the plaintiff was not misled, since he says that, as soon as he saw the light, he knew that it was a danger signal, and instantly did all in his power to stop the train, that he had no doubt what the signal meant, and that it was his duty to stop at once. Moreover, the defendant had another rule to the effect that "a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal and the fact reported to the superintendent."

It is difficult to avoid the conclusion that the real cause of the accident was the blunder of the fireman in assuring the plaintiff that all was right at the switch, when the signals at the cross-over track and on the main track showed the contrary. If, however, the semaphore on the main track did not on that occasion perform its full function of displaying the danger signal, it was not, so far as appears, in consequence of any defect in the appliance which the defendant knew, or should have known, but rather the fault of the operator at the switch. The cross-over track connecting the main tracks of the West Shore with the main tracks of the Central at De Witt was of considerable length and was in constant use for the transfer of cars from one of these roads to the other, and it seems that the switch was kept set for that track and changed only for the main track when the signals called for the change. It is difficult to see how the rule which it is said the defendant should have adopted could be an improvement upon the plan in use at the time of the accident. But, however that may be, it seems to us that the method adopted by the defendant for transacting its business at the point in question was reasonably safe, and that is all that can be required. The defendant's officers could not anticipate any unusual danger from the plan when put into operation, especially in view of the fact that, while it was in use for many years, no accident had happened that could lead men of ordinary prudence to change it for the plan suggested.

Negligence cannot be imputed to the defendant upon the sole ground that it failed to adopt the same methods for operating its road at the point in question that some other roads had in use. Before it can be said that the plan of the other roads was the safest, we would have to know that the conditions were the same, and, moreover, that the result of experience was in favor of that method. So long as the defendant maintained a safe roadbed, rails, and switches, employed competent co-servants, and had enacted reasonable rules for guarding and protecting the cross-over and main tracks by the use of semaphores and signals, indicating plainly whether there was danger or safety, it discharged its whole duty to its employees. Even if it could be seen or found as a fact that the method in use by the other railroads mentioned in the record was better or safer, the master is not

guilty of negligence for not discarding a plan which was reasonably safe, and had proved to be so as the result of long experience.

On the main issue in the case, which was the defendant's negligence in its failure to promulgate some other rule or plan of operating trains at the crossing, there was no evidence to submit to the jury. Sisco *v.* Lehigh & H. R. R. R. Co., 145 N. Y. 296, 39 N. E. 958; Corcoran *v.* D., L. & W. R. R. R. Co., 126 N. Y. 673, 27 N. E. 1022; Berrigan *v.* N. Y., L. E. & W. R. R. Co., 131 N. Y. 582, 30 N. E. 57; Smith *v.* N. Y. C. & H. R. R. R. Co., 88 Hun, 468, 34 N. Y. Supp. 881, affirmed 153 N. Y. 664, 48 N. E. 1107.

The judgment should be reversed, and a new trial granted, costs to abide the event.

CULLEN, C. J., and VANN, WERNER, and CHASE, JJ., concur. GRAY, J., not sitting. WILLARD BARTLETT, J., not voting.

Judgment reversed, etc.

SPIKING *et al. v.* CONSOLIDATED RY. & POWER CO. *et al.*

(Supreme Court of Utah, Jan. 25, 1908.)

[93 Pac. Rep. 838.]

Street Railroads—Death of Pedestrian—Care Required.*—A person crossing a street in front of an approaching street car is not required to use the same degree of care as persons traveling along, on, or across a steam railroad.

Same—Crossing Tracks.†—A pedestrian desiring to take a street car standing on an opposite track was entitled to hastily cross an intervening track on which a car was approaching, provided he exercised ordinary care for his own safety in view of the surroundings.

Same—Contributory Negligence—Question for Jury.—Evidence held to require submission to the jury of the issue of the contributory negligence of a pedestrian, struck and killed by an approaching street car as he was crossing the track.

*For the authorities in this series on the question whether the stop, look, and listen rule is applicable to street railways, see foot-notes appended to Price *v.* Rhode Island Co. (R. I.), 23 R. R. R. 249, 46 Am. & Eng. R. Cas., N. S., 249.

†For the authorities in this series on the subject of the contributory negligence of passengers or prospective passengers in crossing tracks to take or leave trains or cars, see foot-notes appended to Atchison, etc., Ry. Co. *v.* McElroy (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487.

Same—Evidence—Reputation for Care.‡—Where, in an action for the death of a pedestrian in collision with a street car, there were several eyewitnesses to the occurrence who testified, evidence that decedent was a careful and cautious man was inadmissible.

Trial—Reception of Evidence—Necessity of Objection—Motion to Strike—Discretion.—In an action for the death of a pedestrian by collision with defendants' street car, plaintiffs' counsel asked a witness how decedent was as to being a careful and cautious man. The witness answered, without objection, that he was careful, when defendants moved to strike the answer, and excepted to the court's refusal to do so. Held, that as the question indicated on its face that it called for incompetent evidence, in the absence of an objection to it, it was not an abuse of discretion to refuse to strike the answer.

Same—Instructions—Assumed Facts—Judicial Notice.§—Where the fact that fenders were generally used on street cars was treated as a matter of general knowledge, of which the court would take judicial notice, and proof thereof was excluded for that reason, the court was entitled to assume that such fact existed, in its instructions, as if it had been proved.

Appeal—Right to Allege Error—Inconsistent Position.—Where defendants objected to evidence to show that street cars generally were equipped with fenders, because the matter was one of general knowledge, they could not object on appeal that an instruction, in which the court took judicial notice of such fact, was erroneous because of the absence of evidence thereof.

Street Railroads—Injury to Persons on Track—Instructions.—Defendants, having objected to evidence that street cars generally were equipped with fenders, on the theory that such fact was a matter of common knowledge, which objection the court sustained, requested an instruction that there was no evidence that at the time of the accident fenders were in general use, and that there was no proof of negligence because the car that struck decedent was without a fender. The court charged that, if the jury found that the car did not have a fender, they could not find against defendants on that

‡See first foot-note appended to Lexington Ry. Co. *v.* Herring (Ky.), 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635; second foot-note appended to Louisville & N. R. Co. *v.* Daniel (Ky.), 25 R. R. R. 493, 48 Am. & Eng. R. Cas., N. S., 493; Shelly *v.* Philadelphia & R. Ry. Co. (Pa.), 17 R. R. R. 835, 40 Am. & Eng. R. Cas., N. S., 835; last foot-note appended to Southern Pac. Co. *v.* Hetzer (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724; Texas & P. Ry. Co. *v.* Contourie (C. C. A.), 16 R. R. R. 642, 39 Am. & Eng. R. Cas., N. S., 642; Bank of Irwin *v.* American Express Co. (Iowa), 15 R. R. R. 245, 38 Am. & Eng. R. Cas., N. S., 245.

§For the authorities in this series on the subject of judicial notice of matters relating to railroads, see foot-notes appended to McGrew *v.* Missouri Pac. Ry. Co. (Mo.), 9 R. R. R. 855, 32 Am. & Eng. R. Cas., N. S., 855, where all the preceding ones are collected; foot-notes appended to Southern Ry. Co. *v.* Gullat (Ala.), 25 R. R. R. 336, 48 Am. & Eng. R. Cas., N. S., 336.

alone, unless they also found that, if the car had a fender, the "accident" might have been averted thereby. Held that, the term "accident" having been used in the instructions and evidence to refer to the collision itself, the instruction given in effect told the jury that the fender was not in the case as effectually as if the word "collision" had been used.

Same—Appliances—Care Required.‖—A street railway company is only required to adopt methods, machinery, and appliances in accordance with the ordinary usage of the business.

Same—Safety Appliances—General Use.—The rule that it is necessary to prove that certain appliances are in general use by street railway companies before negligence can be predicated on the omission to supply them does not apply to appliances, the use of which is a matter of common knowledge.

Words and Phrases—"Fender."—As applied to street railway cars, a fender is a guard or protection against danger to pedestrians coming in contact with a car.

Evidence—Judicial Notice—Fenders on Street Cars.—Where negligence, in an action for death of a pedestrian by being struck by a street car, was predicated entirely on the omission to provide the car with any fender or guard whatever, the court was entitled to take judicial notice of the purpose of fenders, as applied to street cars; such appliances being in common and general use on street cars.

Street Railroads—Death of Pedestrian—Care Required.¶—Where deceedent was killed in a collision with a street car, and the court called attention to the particular circumstances of the case, an instruction that decedent was required to use his senses, and exercise that degree of care that men of ordinary prudence would have exercised under the particular circumstances of the case as disclosed by the evidence, was not objectionable as requiring too low a degree

‖For the authorities in this series on the subject of the degree of care required of a carrier of passengers with respect to its appliances and roadbed, see foot-notes appended to Alabama Midland Ry. Co. *v.* Guilford (Ga.), 10 R. R. R. 472, 33 Am. & Eng. R. Cas., N. S., 472, where all the preceding ones are collected.

For the authorities in this series on the question, what degree of care a person must use in order to be free from the imputation of negligence, see generally extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236; extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296; Crowe *v.* Michigan Cent. R. Co. (Mich.), 24 R. R. R. 191, 47 Am. & Eng. R. Cas., N. S., 191; Shandrew *v.* Chicago, etc., Ry. Co. (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; Raymond *v.* Portland R. Co. (Me.), 22 R. R. R. 476, 45 Am. & Eng. R. Cas., N. S., 476.

¶See first foot-note appended to Wilson *v.* Southern Ry. (S. Car.), 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548; foot-notes appended to Cole *v.* Blue Ridge Ry. Co. (S. Car.), 21 R. R. R. 606, 44 Am. & Eng. R. Cas., N. S., 606; foot-notes appended to Alabama G. S. R. Co. *v.* Fulton (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311.

of care, in view of evidence that decedent was familiar with the surroundings and conditions prevailing at the place of the accident.

Same.—Where the court repeatedly charged that decedent was required to use all his senses to avoid collision with a street car by which he was killed, and that, unless he did so, plaintiffs could not recover, an instruction was not objectionable in the use of the expression "observing the car," instead of requiring decedent to have "looked for the car" before attempting to cross the track.

Same—Crossing Streets—Place.**—Where decedent was killed in a collision with a street car, as he was crossing the track, at a point some distance from a street crossing, but at which a large number of persons habitually crossed the track, an instruction that he was entitled to rely on the assumption that the company and its servants would discharge their legal duty in approaching crossings by having their cars under control was not objectionable because the accident did not happen at a public crossing.

Same—Duty of Railway Company.—Where a point in a street some distance from a crossing was habitually used by a large number of persons in crossing the tracks of a street railway, it was the duty of the railway company to conform the movements of its cars to such condition and to approach such point with the same degree of care it was required to approach street crossings.

Same—Rights in Streets.††—Where a street railway company is authorized to lay its tracks on a street, no part of the street is thereby withdrawn from the use of the public, the street being merely burdened with an additional easement in favor of the street railway company, with a preferential right of passage over it.

Trial—Instructions—Requests.—It is not error to refuse requests to charge which are covered by instructions given.

Death—Damages—Loss of Profits.—In an action for wrongful death, an instruction authorizing consideration on the question of damages only of the income from property which decedent's skill,

**For the authorities in this series on the question whether a person injured through the conduct of another had the right to assume that the latter had or would perform the duties owing to the person injured, see foot-notes appended to O'Brien *v.* St. Paul City Ry. Co. (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323.

††For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to Olney *v.* Omaha, etc., St. Ry. Co. (Neb.), 23 R. R. R. 300, 46 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to Adams *v.* Camden & S. Ry. Co. (N. J.), 8 R. R. R. 790, 31 Am. & Eng. R. Cas., N. S., 790, where all the preceding ones are collected; foot-notes appended to McCarthy *v.* Consolidated Ry. Co. (Conn.), 22 R. R. R. 685, 45 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to United Rys. & Elec. Co. *v.* Watkins (Md.), 22 R. R. R. 641, 45 Am. & Eng. R. Cas., N. S., 641; Indianapolis, etc., Co. *v.* Kidd (Ind.), 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366; Weinberger *v.* North Jersey St. Ry. Co. (N. J.), 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351.

personal supervision, and diligence had a part in producing was not objectionable as authorizing consideration of profits arising out of decedent's business.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by Emeline Spiking and others against the Consolidated Railway & Power Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

P. L. Williams, G. H. Smith, and *J. G. Willis,* for appellants. *Powers & Marioneaux,* for respondents.

FRICK, J. This is an action for damages for personal injuries resulting in death. The plaintiffs, respondents in this court, are the widow and minor children of the deceased, Thomas W. Spiking, who, in August, 1902, was fatally injured by a street car while attempting to cross the street railway tracks on one of the streets in Salt Lake City. The acts of negligence charged against the defendants, appellants here, are: The omission to sound a gong or ring a bell, or to give any warning of the approaching car; the omission to have the headlight on the car lighted, and in omitting to have any lights on the car; the omission to have the car provided with a fender or guard of any kind; operating the car at a high and reckless rate of speed with the brakes released, and not having the car under the control of the motorman or any other person while approaching and passing onto a certain switch, the place of the accident, and in omitting to look and ascertain whether the track was clear and free from persons passing to and fro at the point of the accident. The evidence is very voluminous, over 30 witnesses having been examined, a number of whom were eyewitnesses to the accident; and, as is usual, there is a conflict with regard to just how and when certain matters occurred, and with regard to the existence or nonexistence of others. From a careful reading of the entire transcript of the evidence, the following facts may be said to be fairly established: The point, or immediate vicinity, of the accident, is one of the principal business centers of Salt Lake City. The accident occurred on East Second South street, about 85 feet east of the east crossing of Main street, at which crossing the two streets intersect. At the time of the accident the appellants operated cars on three tracks on East Second South street running parallel, two or which continued west across Main street, and the third, being the north track, terminated at the point of the accident in a switch which connected it with the middle one of the tracks mentioned. The north rail of the northerly track was 28 feet south of the north curb of East Second South street. At the time of the accident there was no overhead or trolly wire connecting the north with the middle track, and the cars going

west on the north track were switched onto the middle track by what is termed a "flying switch," which was accomplished by the momentum acquired by the car in approaching the switch. On the north and middle tracks the cars went west, while on the south track they went east. On the night of the accident, August 16, 1902, the car on the north track was due at the switch at 20 minutes past 10 o'clock, but arrived at that point at about 18 minutes past 10. As the car was approaching westerly toward the switch, the deceased was seen by a number of witnesses to start from the north curb on Second South street, thence going in a southerly direction towards a car just starting east on the south track, which car would pass his home. Two witnesses testified on behalf of appellants, who were passengers on the car that struck the deceased, which was an open or summer car, that they saw the deceased start from the point stated, and saw him running or going hastily south towards the car on the south track. In the course the deceased was going he would cross the north track at the switch, and when he arrived there the car in question had also arrived at the switch, and the deceased collided with the front end of the car, which knocked him down, and he fell under the car, and the wheels of the rear trucks passed over one of his legs and one foot, crushing them, so that in a few days thereafter he died from the effects of the injuries. A number of witnesses testified that the car was running at a high rate of speed in approaching the switch, others said it was running faster than usual, while the motorman testified that it was moving at from 4½ to 6 miles an hour. All the witnesses concur that no gong or bell was sounded, nor any warning of the approach of the car given. Some of the witnesses testified that there was no lighted headlight on the car, and all agree that just before the collision, or at the instant at which it occurred, all the lights in the car went out. The current was cut off at the time on account of the trolly leaving the north wire in making the cross-over from the north to the middle track, and the brakes were released so as not to arrest the speed of the car in making the cross-over. The motorman did not look for nor see the deceased until the instant he was struck by the car, at which time the power was off, and the only way the speed of the car could be checked was by means of the hand brake, which the motorman applied. There were lights in the streets, and other lights from the surrounding business houses, so that the car could have been seen and was seen approaching from the east. The car was not provided with a fender or any guard. The Main street crossing across the tracks for pedestrians was about 85 feet west of the switch where the accident occurred, but a large number of people habitually crossed the tracks at the point of the accident and immediately to the east thereof. A considerable number of people were about the place at the time of the accident, not directly

at the switch, but near there, to the north and south of it. The cars on all the tracks habitually stopped just east of the Main street crossing to receive and discharge passengers. There is some evidence that the deceased, to some extent at least, was familiar with the conditions prevailing at and about the switch as outlined above. Whether the deceased saw the car approaching does not directly appear. It does, however, appear that he was hurrying to catch the outgoing car. At the time of the accident there was also a car approaching from the east on the middle track some little distance in the rear of the car on the north track. Upon substantially the foregoing facts, the court submitted the case to the jury, who returned a verdict for respondents, upon which a judgment was duly entered. A motion for a new trial having been duly made and overruled, the appellants prosecuted this appeal.

A great number of errors are assigned, but as counsel have condemned them in their brief and in their oral argument, we shall consider those only that are relied upon in the argument.

The first alleged error we shall consider is the one presented last in the brief, but, as it logically comes first, we shall reverse the order. It is urged that the court erred in refusing to direct a verdict for the appellants upon the ground that the deceased was guilty of contributory negligence as a matter of law. In support of this contention it is asserted that the facts of this case bring it within the rule of Teakle v. San Pedro, L. A. & S. L. Ry. Co. (Utah) 90 Pac. 402, 10 L. R. A. (N. S.) 486, in which we held that a person, while walking along the railway tracks in the yard of the railway company and stepping in front of a moving train of cars without looking or listening when he knew the cars were being moved, was guilty of negligence as matter of law. It is contended that the uncontradicted testimony in this case is to the effect that the deceased by the exercise of ordinary care could have seen the approaching car in time to avoid the accident, and that, as matter of law, he must be held to have seen it, and that, therefore, he was guilty of negligence in attempting to cross the track ahead of the approaching car. That the car could have been seen approaching from the east for a distance of nearly a block there is little, if any, room for doubt. That the deceased was required to exercise ordinary care for his own safety, and to that end make use of all of his faculties for seeing and hearing, no one questions; but whether he was required to exercise the same degree of care in attempting to cross a street railway track as in making a similar attempt with regard to a steam railroad, the authorities differ. Some of the cases cited by counsel for appellants, namely, Cawley v. La Crosse City Ry. Co., 101 Wis. 145, 77 N. W. 179, and Young v. Citizens' St. Ry. Co., 148 Ind. 58, 44 N. E. 927, 47 N. E. 142, and perhaps a few others, hold to the doctrine that the degree of care

on the part of the pedestrian is the same in both cases—that is, that he must both look and listen—and in one case, a least, it is held that he must also stop to do so before crossing a street railway track. But the overwhelming weight of authority, including the decisions of this court, is to the contrary. It would seem to require but slight reflection to realize that, in the nature of things, there must be considerable difference between an attempt to cross a street railway and a steam railway, or in passing along the tracks of the one or the other. Without stopping to point out all of the differences, we may be permitted to call attention to one of the fundamental differences between street and steam railways. The part of the street on which a street railway track is laid, and over which cars are operated, is not withdrawn from public use and travel. The rights and duties of the public and the street car operatives are mutual and reciprocal. The only right that the operators of a street railway possess over the public generally is a preferential right of passage over the tracks with the cars, and that between public crossings it is always the duty of the pedestrain or the person driving a vehicle to see to it that he does not impede the street car. But the street car company, in operating its cars, must likewise at all times and places exercise ordinary care so as not to injure any one who may be on or near the track, and at public crossings must have its cars under the control of the operator, and must exercise reasonable care to have them so in approaching the crossings; the degree of care to be exercised always depending upon the prevailing circumstances and conditions. As a general rule, therefore, where a collision occurs between a person lawfully using the street and a street car, the question as to whether the operator or such person, or both, were exercising the degree of care that the law imposes is a question of fact depending upon all the surrounding circumstances and conditions. The reciprocal rights and duties of persons and street railway companies in the use of the streets is well expressed in Campbell *v.* Los Angles Tr. Co., 137 Cal. 565, 70 Pac. 624, where, at page 566 of 137 Cal., page 625 of 70 Pac., it is said: "But, as has been frequently held by this court, the same character of care is not demanded of one crossing a street railroad, where cars are frequently passing at a slow rate of speed and can be easily controlled, as is demanded of one crossing an ordinary steam railroad running through the country, on which heavy trains, difficult to control, go at stated times with great speed. With respect to a street railroad, the mere fact that a person attempts to cross it when a car is seen to be approaching does not of itself constitute negligence. * * * Ordinarily, whether or not he (the person crossing) was negligent in attempting to cross, under the circumstances of the case, is a question for the jury." The same thought is expressed in Hall *v.* Ry. Co., 13 Utah, 258, 44 Pac. 1049, 57 Am. St. Rep. 726, in

the following language: "Persons traveling on the public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along, or upon, or across the ordinary steam railroad." To the same effect is Thompson *v.* S. L. Rapid Tr. Co., 16 Utah, 289, 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621. The case of Marden *v.* Portsmouth, etc., R. Co., 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476, is a well-considered case, in which a large number of cases of this class are reviewed, and where the Utah cases are cited with approval. In Benjamin *v.* Holyoke St. Ry., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446, in referring to this subject, it is said: "The use of the street for electric cars and by the general public was concurrent; and the defendant (the company) was bound, in using the street, to have reference to its reasonable use by others." We have examined a large number of cases, and, from the decisions, we are forced to the conclusion that, where the conditions and circumstances are as they were in the case at bar, the question of negligence is within the province of the jury. In addition to the cases already mentioned, we cite the following well-considered cases: Robbins *v.* Springfield St. Ry., 165 Mass. 30, 42 N. E. 334; Newark Pass. Ry. *v.* Black, 55 N. J. Law, 611, 27 Atl. 1067, 22 L. R. A. 374; Lawler *v.* Hartford St. Ry., 72 Conn. 74, 43 Atl. 545; Shea *v.* St. Paul City Ry., 50 Minn. 395, 52 N. W. 902; Holmgren *v.* Twin City Rapid Tr. Ry., 61 Minn. 85, 63 N. W. 270; Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908; McClain *v.* Brooklyn Ry., 116 N. Y. 459, 22 N. E. 1062; Copeland *v.* Met. St. Ry., 67 App. Div. (N. Y.) 483-485, 73 N. Y. Supp. 856.

The law required that the deceased exercise ordinary care for his own safety. To this end he was required to make use of all of his senses to avoid injury. Did he meet this legal requirement at the time and place of the accident? It is easy enough to assume, when viewing the matters retrospectively, that one has failed in this, that, or the other thing, and, if he had not so failed, he would not have been injured. In view of all the circumstances, may not reasonable men differ with regard to his conduct, as disclosed by the evidence, just before and at the time of the accident? May not, likewise, reasonable men draw different conclusions from the conceded facts? The deceased had a right to cross the track in an attempt to board the street car on the southerly track. He had a right to do so even hastily, provided he exercised ordinary care for his own safety in view of his surroundings. He may have seen the car on the north track approaching from the east. He may have assumed that it would reduce its speed on nearing the cross-over switch. But whether he saw it or not, the jury had a right to determine from all the facts whether or not he acted with reasonable care, and

whether the motorman, in approaching the switch, did likewise. Moreover, as the car was approaching a place where a considerable number of persons habitually crossed the track, a place near the public crossing on Main street, and immediately east of which the cars habitually stopped to take on and discharge passengers, the deceased might have assumed that, if the motorman intended to make the cross-over without reducing the speed of the car, he would give some warning of his intention to do so. If the motorman had done either, it is quite probable that the accident would not have occurred. Under all these circumstances, it was a question of fact for the jury to say whether the deceased was guilty of negligence which directly contributed to the accident. Even an error of judgment by the pedestrian, based upon some act or duty required of the company or its servants, may be taken into consideration in determining who is in the wrong. This is well illustrated in the case of Copeland *v.* Met. St. Ry., *supra,* where a woman, in attempting to cross a street car track ahead of an approaching car which she saw coming toward the point where she intended to cross, was struck and injured while in the act of crossing. The court, in referring to her conduct, used this language: "Her judgment that she could cross in safety was in fault only because of the fact that the motorman had decided not to stop in answer to the signal, 'Slow down;' nor did he, by the ringing of a bell, notify her of his intention." The car in that case was signaled to stop by the woman's son. It was a car which did not stop at the particular point, and proceeded on its course, and reached the point where the woman crossed the track in less time than she had calculated, and was injured by reason of this miscalculation. The case of McClain *v.* Brooklyn Ry., *supra,* is likewise one where the facts and circumstances were in some respects similar to those at bar; and in that case it was also held that the conduct of the parties involved questions of fact to be determined by the jury. It may be that in some of the cases the conduct of the pedestrian may be of such a character that the question is one of law merely. The case of Boring *v.* Union Trac. Co., 211 Pa. 594, 61 Atl. 77, affords an illustration of that class. There the injured person walked along the side of the street railway track ahead of an oncoming car, and, without looking, suddenly stepped onto the track in front of the car, and was struck and injured. It was held that the injured person was negligent as a matter of law. We are, however, not dealing with such a case. In this case there were many matters to be considered, on at least some of which reasonable men might arrive at different conclusions. The Teakle Case, *supra,* was entirely different in this respect from the case at bar. There only one conclusion was permissible from the conceded facts; and hence it was a question of law, and was decided as such. We are convinced that the court committed no error in submitting the case to the jury.

The next assignment to be noticed, briefly stated, arises as follows: Mrs. Spiking, one of the respondents, testified as a witness in the case, and, before the respondents rested, counsel for appellants asked leave to recall her for further cross-examination. After this was concluded, her counsel proposed to ask her a further question upon a matter which he said was not proper on redirect, but desired to ask it because it had been overlooked. No objection being made, counsel asked the following question: "How was Mr. Spiking as to being a careful and cautious man?" The witness answered: "Yes, sir; he was very careful." Counsel for appellants offered no objection to the question, but immediately after the answer moved to strike it out as "irrelevant, immaterial, and incompetent." The court denied the motion, and permitted the answer to stand. Counsel for appellants now urge that the court erred in refusing to strike out the answer. That the evidence of the character contained in the foregoing answer is improper in view of all the evidence in the case must be conceded. This is well illustrated by the following authorities: Adams *v.* C., M. & St. P. Ry., 93 Iowa, 565, 61 N. W. 1059; Louisville Ry. Co. *v.* McClish, 115 Fed. 268, 53 C. C. A. 60; Glass *v.* Memphis & C. Ry., 94 Ala. 591, 10 South. 215; Chase *v.* Maine C. Ry., 77 Me. 62, 52 Am. Rep. 744; Towle *v.* Pac. Imp. Co., 98 Cal. 342, 33 Pac. 207. Some of the authorities are to the effect that, where there are no eyewitnesses in a case of death by accident, such evidence is proper. 1 Shear. & Redf. Ev. (5th Ed.) § 111; 1 Elliott, Ev. § 217. Conceding the evidence to be improper, can this court review the alleged error in view of the state of the record? The question was one propounded immediately after opposing counsel's attention was directed to the fact that the question would be asked out of the regular order. The question upon its face was one that indicated what the character of the answer thereto would be. The answer of necessity would be that deceased was either a careful man or a careless man. If the answer was that he was a careful man, then appellants' counsel did not want it, and, if it had been to the contrary, respondents' counsel would have been opposed to it. But either way the testimony was improper. This is always the result, with regard to improper testimony, under conditions as above indicated; and in view of this the courts have evolved and adopted a rule of practice which is that where the question fairly indicates what the nature of the answer will be, then the adverse counsel must object to the question and obtain a ruling, and save an exception to make the error, if any be committed, available in a court of review. Error may not be predicated upon a denial of the motion alone. This rule is well stated in People *v.* Williams, 127 Cal. 216, 59 Pac. 583, in the following words: "When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then

the motion to strike out comes too late, unless preceded by an objection to the question; but the rule is otherwise when the evidence may, or may not, be admissible." The authorities are numerous to this effect, and among which we refer to the following: Taylor *v.* State, 100 Ala. 68, 14 South. 875; Way *v.* Johnson, 5 S. D. 237, 58 N. W. 552; Wendt *v.* R. Co., 4 S. D. 476, 57 N. W. 227; Cleveland, C., C. & I. Ry. Co. *v.* Wynant, 134 Ind. 681, 34 N. E. 569; Grain *v.* Houston, 45 Neb., at page 836, 64 N. W. 245; McCellan *v.* Hein, 56 Neb. 600, 77 N. W. 120; 3 Jones on Ev. § 898; 22 Pl. & Pr. 1310. In the foregoing cases, excepting those from Nebraska, where the record is like the one before us, it is held that the alleged error is not reviewable. In Nebraska, however, it is held that the motion to strike out is always addressed to the sound legal discretion of the trial court, and that a clear abuse of this discretion is always reviewable. If we adopt the rule generally recognized, we cannot review the alleged error, because under that rule a failure to object to the question waives the error. What would be the result if we should adopt the Nebraska rule? Has the trial court so clearly abused his legal discretion that, in view of the state of the record, error may be predicated thereon? When the motion to strike out was made, counsel for appellant offered some excuse for not making an objection before question was answered. Whether the excuse was well founded depended upon the circumstances, all of which occurred in the presence of the court, and he necessarily deemed the excuse insufficient. We arrive at this conclusion from the fact that at various times during the trial, where answers had been made before an objection either was or apparently could have been interposed, the court permitted counsel on both sides to make objections, obtain rulings thereon, and take exceptions, so that the point could be reviewed by this court. In this instance no such permission was asked. If we attempted to review the action of the court from this point of view, we would have to hold that in the light of the record the court did not abuse its discretion in denying the motion to strike out the answer. We do not wish to be understood as holding that in no case where improper evidence was elicted in this way, which in and of itself either made a case or stated a defense, it would not be held that the action of the trial court in denying a motion to strike out, when timely made, would not be reviewed. In such a case the record upon its face might show an abuse of discretion. Such is not the case before us, and therefore this assignment cannot be sustained.

The remainder of the assignments all refer to the instructions. In passing upon those alleged errors the length of the instructions makes it impracticable to set them forth in full. We, therefore, can do no more than to refer to the particular parts of which complaint is made. The instructions given by the court cover 20

typewritten pages of legal cap, and the requests cover 21 pages in addition to those given. There are many exceptions to those that were given, and many more to the refusal of requests not given.

The first assignment to be noticed relates to the refusal to give two special requests offered by appellants, and in the giving of an instruction upon the same subject by the court. In the complainf negligence was predicated upon the failure of appellants to equip the car with a fender or guard of some kind. At the trial respondents produced a witness who had been employed as a motorman and gripman for a period of nearly eight years on cars propelled by electricity and cable in various cities from Chicago to the Pacific Coast, including Salt Lake City. Counsel for respondents asked the witness whether or not, during the time that he was employed as motorman or gripman, cars in the different cities were equipped with fenders. This evidence was objected to as "incompetent, immaterial, and irrelevant." Counsel for respondents then, by various questions and offers which cover about 10 pages of the transcript of the evidence, attempted to prove that the street cars, during the time the witness was employed as above stated, were equipped with fenders in the cities of Chicago, Omaha, Seattle, San Francisco, and Los Angles, all of which was objected to, and the objections sustained. After counsel had made repeated offers to get into the record the evidence with regard to the use of fenders, counsel for appellants suggested that the purpose for which fenders were used was a matter of common knowledge, and not a subject of expert evidence. The court adopted this view, and ruled that the purposes for which fenders were used on street cars was a matter of which judicial notice could be taken by both the court and jury. Thereupon counsel for appellants objected to any evidence with regard to the use of fenders. Their objections were sustained. No evidence upon the subject of fenders was admitted, except that the car in question was not equipped with a fender or guard of any kind. Upon this state of the record, counsel for appellants requested the court to instruct the jury that there was no evidence "that at the time of the accident guards and fenders were in general use by companies, in similar business, doing their business in a prudent manner," and that "there is no proof of negligence against the defendants, or either of them, on account of there being no fender upon the car." The court charged the jury upon this subject as follows: "If you find that such car did not have a fender, you cannot find against the defendants upon that alone, unless you find also from the evidence that, if the car had a fender, the accident might have been averted thereby." It is strenously insisted that the refusal to instruct as requested, and that the giving of the instruction quoted above, constitutes prejudicial error. It is urged that the instruction was

not based upon a subject of which there was any evidence; that by the repeated decisions of this court instructions must be based upon the evidence, and to instruct upon a subject unsupported by evidence constitutes prejudicial error. Undoubtedly such is the general rule, which has been laid down by this and many other courts. Does the claim here made come within the rule? We do not think so, for several reasons. From what has been said it is apparent that both the court and counsel for appellant treated the purpose for which fenders were used on street cars as a matter of general knowledge. If this was the correct view, then the object, purpose, and use of fenders was in the case to be considered by the jury, as if it had been testified to by witnesses. It is elemental that any facts which are generally known and accepted, and of which courts take judicial knowledge, are part of the case as facts, and the court may instruct upon them to the same extent as upon other facts. Counsel cannot at the trial obtain rulings in their favor upon objections to evidence upon the ground that it is immaterial because the matter is one of general and common knowledge, and then urge on review that there is no evidence upon the subject to support an instruction. But, apart from this, there is room for the contention that the instruction, after it was modified by the court, in effect still was merely negative. The court told the jury that they could not find against appellants upon the omission to equip the car with a fender unless they found that the accident could have been averted by the fender. When the court told the jury that they could not consider the absence of a fender unless they found that if one had been provided it would have averted the accident, he in effect told them that the fender was not in the case. All through the instructions, and in the evidence as well, where the term "accident" is used, it refers to the collision itself. If the court had used the term "collision" instead of "accident" in the instructions, all would at once agree that the presence of a fender could not have averted the collision. The fender was not calculated, like a gong or a bell, or even a headlight, to apprise one of an approaching car so as to avoid it. A fender could have been used to prevent a person colliding with the front end of the car from getting under the wheels by shoving him off the track or by carrying him along in front of the car. If the court had told the jury that a fender might be considered in case they found that it would have prevented the injuries—that is, the crushing of deceased's leg and foot—there would be more force to counsel's contention. Even then we think the instruction would not be subject to the criticisms made of it. We do not rest our decision with regard to this assignment upon what we have said about the negative character of the instruction; what we have said was for the purpose of illustrating the point that the instruction is not necessarily open to the construction placed upon it by counsel.

Passing now to the claim made by counsel that by this instruction the jury were authorized to require from the appellants a standard of care in the conduct of their business different from that which may have been generally prevailing—that is, in view that there was no evidence in the record with regard to the use of fenders generally—the jury could not be permitted to say that not to use one on the car in question constituted negligence. It is true, as is well said in section 44 of Labatt on Master and Servant, that: "The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man." This doctrine with regard to the use of safety and other appliances is approved and adopted by this court, in speaking through the present Chief Justice, in the case of Fritz *v.* Electric Light Co., 18 Utah, 493, 56 Pac. 90. We have no inclination to either question the soundness of the doctrine or to modify it; but we are convinced it is not applicable to the facts in this case. It does not follow that, because it may be necessary to prove that certain appliances are in general use before negligence can be predicated upon the omission to supply them, therefore the rule applies to all appliances of whatever kind or character, or for whatever purpose used. The purpose of some appliances may be so generally known that it becomes a matter of common knowledge; and therefore the proof in that regard may be dispensed with. This may be illustrated by referring to a few only of many instances that may be named. Would any one now assert that, before one could predicate negligence on the failure to provide a headlight on a locomotive engine during its use at night, or in failing to provide cars in use with brakes, or in providing such locomotive engines or other boilers in use with what are known as "spark arresters," proof would have to be made that such appliances are in general use? We think not, for the simple reason that the purposes of the appliances above mentioned have become so generally known that proof of the fact is wholly unnecessary. This in time will no doubt be true of some of the appliances which now require proof of general use. If this be so, does the fender, as applied to street cars, come within the category of appliances whose purposes are a matter of common knowledge? We think it does. It certainly has a clear and well-defined meaning; and its purpose has also received legal recognition. "Fender," in 19 Cyc. 489, is defined as follows: "As applied to street railway cars, a guard or protection against danger to pedestrians." In the case of Cape May Ry. *v.* Cape May, 59 N. J. Law, 403, 36 Atl. 699, 36 L. R. A. 653, in referring to the term "fenders" as used in an ordinance, where the objection was made that the use of the term "fenders,"

without further definition, was vague and uncertain, and for that reason the ordinance was not enforceable, it was said, "The term 'fender' is well defined and readily understood as a guard and protection against dangers," and the ordinance was accordingly enforced. If, therefore, the term "fender" has acquired a well-defined meaning in law, and its purpose is legally recognized and understood, it must be so, because this meaning is the popularly and generally accepted meaning and purpose. The law does not precede but follows the popular and general understanding with regard to such matters. We think, therefore, that in this case, in view that the negligence was predicated entirely upon the omission to provide the car with any fender or guard whatever, the court had the right to take judicial notice of the purpose of fenders as applied to street cars. Had the complaint charged negligence in the use of an improper fender, or of one not in general use, then it no doubt would have been necessary to support the allegation with proper proof by showing the kind of fenders in use generally by those engaged in a similar business which was managed and conducted with ordinary prudence and care. But the negligence, if any, consisted in not providing any appliance whatever, the purpose of which is well known and recognized, and, this being so, the only proof that was required was to show its absence. If we are right in our conclusions, then it was for the jury to say, from all the facts and circumstances in evidence, together with the inferences to be drawn from them, whether or not a fender would have obviated the injuries. Unless the jury so found, the absence of a fender was wholly immaterial. The mere fact that no fender was provided did not, and could not, have any effect one way or the other, unless the fender would have guarded and protected the deceased against injury. We remark further, that, in view of what we have said with regard to the purposes of fenders, it may well be that the street railway company can no longer excuse itself for not equipping its cars with fenders at this late date by simply pointing to the fact that others, engaged in similar business, do likewise. There are some things that it may be negligent to do, or omit to do, although all others do or omit to do them. This is well illustrated in the cases of Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580, and Ilwaco Ry. Co. *v.* Hedrich, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169. We are convinced that appellants were not prejudiced in any of their substantial rights in this regard, and therefore this assignment must be overruled.

It is also claimed that the court erred in instructing the jury with regard to the duties devolving upon deceased in attempting to cross the track. In this regard the court in effect told the jury that the deceased was required to use his senses, and exercise that degree of care that men of ordinary prudence would have exercised under the particular circumstances of the case as dis-

closed by the evidence. It is urged that this was insufficient, because the deceased was shown to have been familiar with the surroundings and conditions prevailing at the place of the accident, and therefore the usual or ordinary test did not cover the case. We think otherwise. The court called attention to the particular circumstances of this case, and within these were necessarily included all the circumstances which had any bearing upon the conduct of either party. Moreover, there is no intimation anywhere in the record that any one made any claim that any consideration should be based upon the fact that the deceased did not know the conditions and circumstances surrounding him at the time of the accident, and that he did not know the conditions generally prevailing at that place. We cannot perceive any error in this regard.

Error is also predicated upon the instruction where the court referred to the care the deceased was required to exercise in looking for an approaching car. In this instruction the court used the expression of "observing the car" instead of "looking for the car" before attempting to cross the track. It is urged that to merely require one to observe an approaching car is not sufficient; that it does not meet the duty imposed by law, which requires that a pedestrian, before attempting to cross the track, must look to see whether or not a car is approaching. We think the jury clearly understood what the court desired to impress upon them in the instruction. The court repeatedly told the jury that the deceased was required to use all of his senses, and in different instructions told them what the law required of him, and, unless they found that he had complied with those requirements, the respondents could not recover. In view of this the appellants could not have been prejudiced.

Another error assigned is that the court erred in directing the jury that a person, in attempting to cross a street railway track, "has a right to rely upon the assumption that the company and its servants will discharge their legal duty, in approaching crossings, by having their cars under control." It is urged that, in view that the accident did not occur at a public crossing, therefore the instruction is not based on the evidence and is contrary to law. The instruction, however, contains simply an abstract statement of the law, as applied to persons and street railroad companies, with regard to crossings generally. It is true that the accident occurred at a point some distance east of the main street crossing. But there was an abundance of evidence which tended to show that a large number of persons habitually crossed the track at and near the place of the accident. This, in effect, widened the extent of Main street crossing, all of which had existed for a long time prior to the accident, and was well known to the street car company and its servants; and hence it became their duty to adopt the movements of the cars to the prevailing conditions and circumstances. As we have already pointed out

in this opinion, no part of the public street is withdrawn from use by placing a street railway track upon it. The street thereby is merely burdened with an additional easement in favor of the street railway company, with the preferential right of passage over it. The public are not merely licensees in using that portion of the street occupied by the street railway track. They are not there by the mere permission of the owner of the street railway; but they are there as a matter of legal right, and may so remain until the street railway company desires to pass over it with one of its cars. The right of passage by the company is a preferential right to which all others must yield. But, in exercising this right, the company and its servants must have due regard for the safety of those who may be on the street, or on or near the street railway tracks. If, therefore, any considerable number of persons habitually cross the track at a certain point, it is not material that such a point is not at the regularly established crossing in so far as it affects the care of the street railway company in passing that particular place. The right to the use of the public streets cannot be curtailed in this way. The public must have due regard for the preferential right of passage of the street cars, and must exercise the degree of care commensurate with this right; but the street car company may not say that it will not permit the use of streets except at public crossings, and that any person who attempts to use or cross them at other places does so at his peril. Both parties must so adapt their movements and conduct as will conserve the rights of all, and whether the one or the other has departed from the standard of care required at a public crossing, or on any other part of the tracks occupying a portion of the street, is, and of necessity must be, ordinarily, a question of fact. By what we have said, we do not mean that a street car company must at all points move its cars at the same rate of speed, or exercise the same vigilance, or have its cars under control to the same extent as at public crossings; but what we desire to impress is that the company must at all places exercise a degree of care which the existing conditions require, and that pedestrians, or any one using the street with horses and vehicles, must do the same. The court in no way departed from this rule in the instructions; and therefore no error was committed in giving it.

Error is also based upon the refusal of the court to charge the jury as requested by appellants in their request numbered 32. This request is to the effect that it was the duty of the deceased in approaching the track to look for an approaching car, and that, if he had looked, and by looking would have seen the car in time to have avoided the accident, but did not do so, and if the motorman did not have the last clear chance to have avoided the accident by the exercise of reasonable diligence, then the verdict should be for defendants. While this charge was not given to the jury in the exact language employed

by counsel, we think that the substance of it was covered in several instructions given by the court. Instructions given by the court. Instruction numbered 20 given covers a portion of it; and this instruction was in substance the same as requests numbered 8 and 9, asked by appellants. In view of this, the court did not err in refusing the request.

The last assignment to be noticed is directed against an instruction given in relation to the measure of damages. The instruction is a very long one, covering the whole range of matters to be considered by the jury in determining the amount to be allowed the widow and minor children for the loss sustained by them through the death of the husband and father. In the instruction is included in substance the whole of the requests upon the subject by appellants. The exception and argument, however, are directed against the concluding part of the instruction, which reads as follows: "You will not consider, in fixing damages, any income from any property that the deceased had, if any, at the time of his death, produced by the property itself alone, independent of his care, skill, and supervision; but you should consider any income from any and all of his property which his skill, personal supervision, diligence, and care have a part in producing." It is strenuously argued that under this instruction the jury could have considered the profits arising out of deceased's business, and that profits arising from any business or enterprise cannot be considered in action of this kind, unless the profits are for past losses, and then they must be specially pleaded if a recovery is sought therefor. While the phraseology of the instruction is not to be approved as a model, nevertheless, for the reasons hereafter stated, it cannot be held that it was prejudicial to the rights of appellants. It may be conceded that it frequently has been held that mere future profits, arising out of a deceased's business, cannot be considered in a case of this character. But this is so because the element of future profits is too uncertain, besides being speculative and remote. Under our statute, both the wife and the children were heirs of the deceased, and as such were entitled to recover, not only for the loss of support, companionship, and the assistance he would naturally and probably be to them, but were entitled to all the pecuniary loss that they may have sustained by reason of his death, which could be established with reasonable certainty in view of all the circumstances pertaining to the subject-matter. The authorities under statutes similar to ours, we think, are clearly to this effect. In Hayes *v.* Williams, 17 Colo. 465, 30 Pac. 355, the rule or measure of damages is stated thus: "This rule allows, as compensatory damages, the estimated accumulations of deceased during 'the probable remainder of his life, if he had not come to an accidental death, having reference to his age, occupation, habits, bodily health, and ability.'" The rule in case of death of a husband and father is stated, in much the same terms, in section 160 of Tiffany on

Death by Wrongful Act. See, also, San Antonio & A. P. Ry. Co. *v.* Long, 87 Tex. 148, 27 S. W. 113, 24 L. R. A. 641, 47 Am. St. Rep. 87. The instruction strictly limited the recovery to such accumulations as would likely be produced by the "skill, personal supervision and diligence" of the deceased, and all future income from any property the deceased owned, at the time of his death, not produced from the deceased's personal efforts, was excluded. Future profits, as such, were, therefore, not only not included, but they were expressly excluded, as an element for which a recovery could be had. The respondents in this regard were entitled to receive what they would have received if the deceased had lived. This, so far as the loss could be established with reasonable certainty, was the measure of damages. If from the evidence it appeared that the deceased's ability and habits were such as gave reasonable grounds to believe that he would accumulate property in excess of his expenditures, then his heirs were entitled to the loss so sustained by them. These losses cannot be limited strictly to a fixed sum of earnings for a day, week, or month. If absolute certainty were required, very little, if anything, could be recovered. Matters of this kind depend on the inherent probabilities, and these were all in evidence on the part of appellants, as well as on the part of respondents; and in view of the evidence on this subject we are fully persuaded that no prejudicial error was committed, either in admitting the evidence upon the subject, or in giving the instruction complained of.

In concluding this opinion, we remark that this case has been tried three times. At the first trial the jury disagreed, and on the second trial a verdict was returned in favor of respondents, which was set aside by the trial court, and on the third trial the jury again rendered a verdict in favor of respondents, upon which the present judgment was entered. It is only fair to state that the counsel who presented the case to the court did not try it in the court below. We make this statement because the record presents exceptional features which have arisen, in part at least, out of the theories of counsel trying the case, and which, according to their views, might not present the question in the precise form in which they have been argued before us. We have read the entire record with more than ordinary care. There were a large number of eyewitnesses who gave their version of the accident; every feature of the case was thoroughly covered by the instructions; and in the light of the whole record we are convinced that the case was properly submitted to the jury, and that, if they have committed any error of judgment in weighing and reconciling the evidence, it is one that the law, perhaps wisely, forbids us to review.

The judgment therefore should be, and accordingly is, affirmed, with costs to respondents.

MCCARTY, C. J., and LEWIS, District Judge, concur.

DOHERTY. *v.* DES MOINES CITY RY. CO.

(Supreme Court of Iowa, Dec. 16, 1907.)

[114 N. W. Rep. 183.]

Street Railroads—Actions for Injuries—Instructions.—In an action for personal injuries caused by a collision between a street car and a team which plaintiff was driving, an instruction leaving the jury to determine whether ordinary care would require plaintiff to ascertain whether he could cross safely, by the use of his senses of sight and hearing, was error, as plaintiff was bound in law to ascertain whether or not it was safe to attempt a crossing.

Trial—Instructions—Conformity to Issues.*—Where, in an action for personal injuries caused by a collision in the nighttime between a street car operated over one street and a team which plaintiff was driving on an intersecting street, the undisputed evidence showed that the accident occurred notwithstanding the efforts of both the motorman and plaintiff, upon discovering the danger, to avoid the collision, the doctrine of "last fair chance" did not apply, and an instruction based on such doctrine was erroneous, under the rule that the charge must be confined to those matters on which an issue has been joined.

Appeal—Harmless Error—Instructions.—The giving of an instruction based upon the doctrine of "last fair chance," which was not authorized by the evidence, was not harmless, where the jury might have understood from the giving of the instruction that they could favor plaintiff with a verdict notwithstanding that his own negligence was apparent and the primary cause of the accident.

Street Railroads—Collisions with Vehicles—Contributory Negligence—Injury Avoidable Notwithstanding.†—A street railroad company is liable for injuries caused by a collision between one of its street cars and a team, notwithstanding the contributory negligence

*For the authorities in this series on the subject, of the "last clear chance" doctrine, see foot-notes appended to Louisville Ry. Co. *v.* Edelen's Adm'x (Ky.), 25 R. R. R. 691, 48 Am. & Eng. R. Cas., N. S., 691; foot-notes appended to Drown *v.* Northern Ohio Traction Co. (Ohio), 25 R. R. R. 1, 48 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to Teakle *v.* San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

†For the authorities in this series on the question whether there may be a recovery against a railroad company for injuries caused by running a train or street car against a person, where he was guilty of contributory negligence but his peril should have been discovered by those in charge of the train or car in time to have prevented the collision, see foot-notes appended to Texas & P. Ry. Co. *v.* Modawell (C. C. A.), 23 R. R. R. 345, 46 Am. & Eng. R. Cas., N. S., 345, where all the preceding ones are collected; Teakle *v.* San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

of the driver of the team, where in the exercise of due care by the motorman the danger might have been discovered in time to have avoided the calamity.

Damages—Instructions—Future Damages.—In an action for personal injuries, an instruction on damages, using the expression "full, fair and actual present compensation," which was made applicable to future damage as well as to that already accrued, was misleading and confusing.

Street Railroads—Actions for Injuries—Questions for Jury—Contributory Negligence.—In an action for injuries caused by a collision between plaintiff's team and a street car, whether or not plaintiff was guilty of contributory negligence in not seeing the approaching car and thus avoiding the collision, held, under the evidence, a question for the jury.

Appeal from District Court, Polk County; Hugh Brennan, Judge.

This is a personal injury action. Plaintiff had a verdict and judgment in the trial court, and the defendant appeals. Reversed.

N. T. Guernsey, for appellant.
Gillispie & Bannister and *H. E. Spangler,* for appellee.

BISHOP, J. The accident out of which plaintiff's injury grew occurred on Cottage Grove avenue, in the city of Des Moines. The general direction of the avenue at the place of the accident is southeast and northwest. G street, the general direction whereof is north and south, comes in from the south and terminates at its junction with the avenue. To the west, Twenty-First street—also a north and south street—intersects the avenue. The distance from G Street to Twenty-First street is something less than 200 feet. From Twenty-First street west, the avenue deflects slightly to the south, thus bringing the direction more nearly east and west by 6 or 8 degrees. The defendant operates a double track line of street railway—the motive power being electricity—on the avenue—the east-bound cars using the south track. The south rail of this track is about 15 feet from the street curb. The accident occurred about 9:30 o'clock in the evening, and it was quite dark at the time. Plaintiff had driven his team—a span of mules hitched to an ordinary work wagon—north on G street, and, on reaching the avenue, he turned west. He had not proceeded far when an east-bound car struck his team, and, as a result of the impact, he was thrown out of his wagon and fell upon the pavement. Negligence on the part of defendant is alleged in several particulars. It is said that the car was being operated by a careless and incompetent motorman at a high and dangerous rate of speed, greatly in excess of the rate per hour permitted by the ordinances of the city; that no attempt was made by said motor-

man to slacken the speed of his car as he approached the street crossing; that the motorman failed and neglected to keep a sharp lookout over and upon both sides of the track as he approached the crossing, and that he gave no warning by bell or other signal of the approach of the car.

1. The ninth instruction given by the court on its own motion is complained of as involving error. The portion of the instruction which is criticised reads thus: "It was the duty of the plaintiff to use his senses in order to ascertain whether or not he could safely drive upon the street-car tracks upon Cottage Grove avenue at the time he did. It was his duty to do what an ordinarily careful and prudent man would do under like circumstances in order to ascertain whether it was safe to drive upon these tracks where the plaintiff attempted to drive upon them. And in determining whether ordinary care would require plaintiff to ascertain whether he could cross safely by the use of his senses of sight and hearing, you will take into consideration whether the plaintiff knew, or in the exercise of ordinary care should have known, that the car was approaching; whether he knew, or in the exercise of ordinary care should have known, that a car might be approaching at any time, the rate of speed at which the car was running, and whether he could have ascertained by looking just before he went upon the track whether it was safe to drive upon it; whether an ordinarily careful and prudent man would have so looked; and all the other facts and circumstances disclosed by the evidence bearing upon this question." That the propositions stated in the first two sentences of this instruction are correct in law is not open to doubt. But from there on the instruction is open to attack as confusing, to say the least. It was not for the jury to determine whether ordinary care required of plaintiff that he ascertain by the use of his senses if it was safe in reason to attempt a crossing. That he was bound to do in law, as the jury was correctly told in the initial sentence of the instruction. This, of course, in view of the evidence which made it appear that he was knowingly on the tracks, and that he was familiar with the operation of cars thereover. Under the circumstances here disclosed, the duty of plaintiff to use his senses was absolute, and the only question which should have been given to the jury for debate and answer was whether, in view of the known situation and the then present conditions disclosed to him through the medium of his senses, he might in the exercise of ordinary care attempt a crossing. Stanley *v.* Railway, 119 Iowa, 526, 93 N. W. 489.

2. In the tenth instruction the jury was told that plaintiff could not recover if it found that his own negligence contributed in any degree to his injury. The instruction then preceeds: "But you are instructed that although you might find the plaintiff was negligent in going upon

the tracks of the defendant at the time and in the manner he did, if you further find that the defendant's motorman saw the plaintiff upon said tracks in a position of danger in time to have avoided the accident and injury, or by the use of ordinary care and caution he should have seen plaintiff, and that he negligently failed to stop said car, and said failure was the direct and proximate cause of the accident and injury to plaintiff, if you so find, then your verdict will be for the plaintiff." In view of the record before the court, that portion of the instruction which we have quoted should not have been given. Plaintiff detailed the circumstances of the accident as follows: "As I approached the avenue, my team was walking along at a good walk. When I got probably 20 or 30 feet south of the track, that was my first view that I could get west to look and see whether there was a car coming. I had to go west, and naturally looked that way first. Seeing nothing coming from the west, I looked east and there was nothing coming. About the time I looked around to get my course, there was a street car into me or almost into me. I started to pull my team to the south, and did not get them started to swing until I saw it was going to come into me, and I stood up in the wagon and was going to jump out, but before I had time to jump they were into me. The motorman in charge of the car testified that after passing Twenty-First street, and as he approached G Street, he saw the mules coming out from that street; that they were just entering upon the pavement of the avenue, and were about two car lengths, or 80 feet, away. "I rang the bell about as hard as I could. I used all the efforts I could to stop the car." The only other witness whose testimony had material bearing on the subject was one called by plaintiff. He testified that at the time of the accident he stood on the north side of the avenue, a little east of G street. "The accident occurred about the west side of G street just as the team was turning the corner." And on cross-examination he testified that the car began to slow up before it struck the team. "I think the motorman set the brake as quick as he could after the team appeared on the avenue."

In this situation of the evidence, there was no room for application of the doctrine of "the last fair chance." That doctrine can have application only in the cases where it is made to appear that the negligence of the defendant, culminating in the accident, arose after the discovery of the position of danger in which plaintiff by his negligence had placed himself. This is upon the theory that under such circumstances the negligence of defendant, and not the prior act of negligence of plaintiff, must be regarded as the proximate cause of the accident. Thus, in McDivitt *v.* Railway, 99 Iowa, 141, 68 N. W. 595, it appeared that the plaintiff had driven a covered wagon on the tracks of the defendant company, and this he did without looking for approaching cars. A car coming up from behind struck his wagon, throwing it over,

and he was caught in the wreckage. The motorman in charge of the car sought to back his car away, but in making the attempt he forgot to reverse the electric current, and the result was that the car started forward, pushing the wagon with plaintiff inside along the pavement, and out of this came the injury of which complaint was made. Such appearing to be the facts, it was held that the negligence of plaintiff in driving upon the tracks without taking note of the approaching car did not preclude a recovery. And the books are replete with cases in which the doctrine has been given application. But here we have a case in which without dispute the facts are that in the nighttime a street car being operated over one street and a team being driven on an intersecting street come into collision at or near the intersection, and this notwithstanding the efforts—following discovery—of each driver to avoid such collision. If in the happening of such an accident there be negligence, in the very nature of things it must be primary in character; there is no room for a finding that either was negligent as to the other after the collision became imminent. It is fundamental in our law of practice that the charge of the court must be confined to those matters on which an issue has been joined—arising either in pleading or out of the evidence. Accordingly, the giving of an instruction not pertinent to some issue in the case is error. And the error will be deemend prejudicial unless the record as a whole shows that in reason no prejudice could have resulted therefrom. Wall *v.* Railway, 89 Iowa, 193, 56 N. W. 436.

No conclusion against prejudice can be drawn from the record before us. The jury may very well have understood from the giving of the instruction that out of the evidence it was possible to favor plaintiff with a verdict, notwithstanding that his own negligence was apparent, and, for that matter, the primary and efficient cause of the accident.

Counsel for appellant further insists that conceding the issue to have been such as to call for an instruction presenting the rule of the last fair chance, still there was error in that the instruction as given went beyond the rule and told the jury in substance that negligence on the part of plaintiff, if found, would not preclude a recovery by him, if further found that the motorman with the use of ordinary care and caution should have discovered the danger to plaintiff in time to have stopped the car, etc. It is no doubt true by the great weight of authority that in the case of steam railways, operated over private ways, there can be no recovery for injuries sustained by one negligently exposing himself to danger, except on proof that after being actually discovered the railway employees might have stopped the train, and that they negligently failed to do so. As the proposition is put in some of the cases, the injury inflicted, to be recoverable for, must appear to have been wanton in the sense that the person in

charge of the train, after being made aware of the danger, and having the means at hand by the use of which he might have prevented the accident, negligently failed to adopt or make use of such means. But in this state, as in many of the other states, the rule applicable in steam railway cases is departed from when dealing with accidents arising out of street railway operation, to the extent at least of holding that proof of actual knowledge of the position of danger of the party who suffers injury is not in all cases, and ex necessitate, required. On the contrary, it will be sufficient to warrant a finding for liability if it shall be made to appear that in the exercise of due care the position of danger might have been discovered in time to have avoided the calamity. Doran *v.* Railway, 117 Iowa, 442, 90 N. W. 815; Barry *v.* Railway, 119 Iowa, 63, 93 N. W. 68, 95 N. W. 229. The reasons for the rule will be found stated in the opinions written by Mr. Justice McClain, in the cases thus cited, and we need not at this time enlarge upon what is there said. Cases arising elsewhere and holding to the same view will be found cited in 2 Thompson on Negligence, § 1467 et seq., and in Supp. to that work, page 278.

3. The instruction given the jury on the subject of the measure of damages is also criticised, and we think with show of reason. Reduced to the smallest compass possible, it reads thus: Plaintiff is entitled to recover, if at all, such damages as are shown to have been sustained by him as the proximate result of the injury alleged. The amount of his recovery, if entitled to recover, "will be a full, fair, and actual present compensation for the injury in fact sustained, which is alleged in the petition and proved by the evidence, including injury in the future, if you find that his injuries are permanent as shown by the evidence." "You will also take into account the physical pain and anguish of plaintiff, as shown, by reason of the injury alleged. If you find that his injury will continue or, if permanent, you will consider the probable duration thereof and allow him for such physical pain and mental anguish in the future as you find he will hereafter endure. You will further consider the wages he was earning prior to the accident, the expense incurred for doctors, for hospital care, his loss of time caused by the accident, and that may, if you find that he is permanently injured, follow in the future. The law can give no rule by which to accurately measure plaintiff's damages as to mental anguish, pain and suffering. The amount of his recovery must of necessity be left to your sound judgment and discretion in the light of all the facts and circumstances disclosed in evidence."

Counsel for appellant does not deny but that pain and anguish —past and future—time lost, and expenses incurred, are proper as elements of damage in cases such as this. He argues, however,

that in all likelihood the jury may have been misled into or found warrant in the instruction as given for an assessment for double damages; that is, that they may have understood, in view of the form constituted independent and additional elements of damage, for which a special recovery as to each could be had. We are not prepared to express opinion that the conclusion thus contended for should be reached. The thought intended to be conveyed by the instruction undoubtedly was that the matters referred to, as far as established by the evidence, were proper for consideration in arriving at the amount of damages to be awarded. And we think it probable that such was the understanding acquired by the jury. It remains to be said, however, that the instruction cannot be commended for its method of arrangement and form of statement. And this will be sufficient to suggest the advisability of a revision of the instruction in the event of a retrial of the case.

The instruction is further criticised because of the use of the expression "full, fair and actual present compensation," etc. And as this is made applicable by the language which follows to the damage to accrue in the future as well as to that already accrued, we think the expression falls short of a clear and adequate statement of the law. And it is not materially aided by the remaining language of the instruction. As to the damages for physical pain and mental anguish, it is true, as said in the instruction, that there can be no fixed rule for measurement. The amount must be left to the sound judgment and discretion of the jury. But the jury should be told that in respect to future pain and anguish recovery must be based upon an impartial, approximate estimate of the sum which being presently paid will afford reasonable compensation. As to the future loss of time or diminished earning capacity, recovery must be limited to such a sum as being presently paid will afford reasonable compensation; that is, make recompense to the injured person for the property loss which he may fairly be expected to sustain in the future. Material to this, of course, is the evidence as to his previous condition—physical and mental—his education, habits of industry, etc. Reverting to the instruction as given, we are not quite sure that we catch in an appreciative way the thought intended to be conveyed by "full, fair and actual present compensation." It is probable that the court had in mind the correct rule, but in the hurry of a jury trial omitted to employ a form of words adequate to correct expression. Be that as it may, however, if the instruction was calculated to mislead or confuse the jury, and we think it was, it must be condemned.

4. At the close of the evidence counsel for defendant presented a motion for a directed verdict based on the ground that the evidence established contributory negligence on the part of plaintiff, and this motion was overruled. A request for instruc-

tion addressed to the same point was handed up and refused. It is argued before us at considerable length that here was error. The argument is based upon the fact contention that plaintiff could have seen, and hence should have seen, the coming car, on which a bright headlight was burning, in time to have stopped his team before entering upon the track, and thus have avoided the collision. And in view of the location and surroundings as shown by the evidence, the argument is not without persuasive force. But plaintiff says that as he approached the avenue he looked to ascertain if the track was clear, and that as he drove on the pavement he saw no car and heard no warning bell or signal. As disposed at present, we must decline, as did the trial court, to pass upon the probability of his story. It was not error to submit the same to the jury.

Other matters discussed in argument are either devoid of merit, or are not likely to arise upon a retrial of the case. For the errors pointed out, the judgment is reversed, and the case will be remanded for a new trial.

Reversed.

SIMKOFF *v.* LEHIGH VALLEY R. CO.

(Court of Appeals of New York, Dec. 17, 1907.)

[83 N. E. Rep. 15.]

Railroads—Negligence—Accidents at Crossings—Children—Burden of Proof.—In an action by an infant against a railroad for injuries through being struck by a locomotive while crossing defendant's track, plaintiff has the burden of proving that he was non sui juris.

Same—Care Required—Questions for Jury.*—In an action by an infant over seven years old against a railroad for injuries through being struck by a locomotive while crossing defendant's track, the degree of care to be reasonably expected of plaintiff was a question of fact for the jury to determine under the circumstances and on the evidence as to his capacity and intelligence.

Appeal—Review—Harmless Error—Evidence.—In an action by an infant for injuries through being struck by a locomotive while crossing defendant's track, error in holding that the burden of proving that plaintiff was sui juris was on defendant was not prejudicial.

*For the authorities in this series on the subject of the care required of a child for its own protection, see foot-notes appended to Serano *v.* New York, etc., R. Co. (N. Y.), 25 R. R. R. 293, 48 Am. & Eng. R. Cas., N. S., 293; St. Louis, etc., Ry. Co. *v.* Sparks (Ark.), 25 R. R. R. 739, 48 Am. & Eng. R. Cas., N. S., 739; Duggan *v.* Boston & M. R. R. (N. H.), 24 R. R. R. 797, 47 Am. & Eng. R. Cas., N. S., 797; Illinois Cent. R. Co. *v.* Johnson (Ill.), 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; Van Salvellergh *v.* Green Bay Traction Co. (Wis.), 23 R. R. R. 330, 46 Am. & Eng. R. Cas., N. S., 330.

Simkoff *v.* Lehigh Valley R. Co

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Leonard Simkoff, an infant, by guardian, against the Lehigh Valley Railroad Company. Judgment for plaintiff (103 N. Y. Supp. 1142), and defendant appeals. Affirmed.

Lyman M. Bass, for appellant.
George H. Kennedy, for respondent.

GRAY, J. The plaintiff has recovered a verdict in damages for personal injuries, which, he alleged, were occasioned through the negligence of the defendant, and the judgment has been affirmed by the Appellate Division. The plaintiff was, at the time of his accident, an infant of over seven years of age. While crossing the tracks of the defendant, in the city of Buffalo, he was run down by a locomotive engine, and received the injuries of which he complains. According to the evidence on either side, the engine approached the street crossing at a rate of speed not to exceed three to four miles an hour. The plaintiff's claim was that his foot was caught in a gap in the planking of the sidewalk, upon which he was passing, where it met the rail of the track, and that, while helpless therefrom, the engineer, though he could see him, neglected to stop his engine. The case presented, mainly, a question of fact upon the evidence with respect to the way in which the accident occurred, and we might affirm the judgment, without any expression of opinion, were it not for the ruling of the trial court upon a certain request made by the defendant. The plaintiff himself was not examined. His father testified that he had been "a bright, intelligent boy," who had, for two summers, attended school, and who was accustomed to pass over the same way every few days for the past few years.

The trial judge, in his charge, left it to the jury to say whether the plaintiff was of "sufficient mental capacity by reason of his age to appreciate danger and exercise caution." Upon the conclusion of the main charge, the court was requested by the defendant, further, to charge "that the burden of proving that the plaintiff was unable to properly care for himself at the time of the accident is upon the plaintiff." The judge refused to charge as requested, holding, upon the authority of Costello *v.* Third Ave. Railroad Co., 161 N. Y. 317, 55 N. E. 897, that the burden was upon the defendant of establishing that an infant of that age was *sui juris.* In so ruling, I think the learned trial judge erred as to the general legal proposition. The opinion of this court in the Costello Case did not pass upon the question of the burden of proof in such cases. The rule has been more properly stated by this court in the opinion in the case of McGrell *v.* Buffalo Office Bldg. Co., 153 N. Y. 265, 47 N. E. 305. I am not aware that we have decided to the contrary. In that case Judge Martin, speaking for the court, said that, if the infant (in

that case a girl of between nine and ten years of age) was "unable to properly care for herself under the circumstances, the burden of establishing that fact was upon the plaintiff." In Stone *v.* Dry Dock, E. B. & B. R. R. Co., 115 N. Y. 104, 21 N. E. 712, where the infant was seven years of age, the same rule was laid down. The establishment of the fact that an infant is *non sui juris* to the satisfaction of the jury, if considered material, is as much a part of the plaintiff's case as any other evidence is, upon which he relies to make out a case for a recovery. Some evidence should be given showing the extent of the child's capacity to care for himself, where, as here, he is left more or less to himself; that is, not in the care of a parent, or other guardian. The degree of care to be reasonably expected in an infant of the plaintiff's age was a question of fact for the jury to determine under the circumstances and upon the evidence as to his capacity and intelligence. As it was observed in McGrell's Case, the plaintiff "was not of such tender years that it could be held, as matter of law, he was *non sui juris.*"

While, therefore, the ruling of the trial court was erroneous, I do not think that the error was material, or prejudicial, to the defendant. The course, which the trial of the issue took, made it of no importance whether the plaintiff was, at the time, *sui juris* or *non sui juris.* According to the evidence for the plaintiff, he was unable to withdraw his foot from the hole between the plank of the sidewalk and the rail, and the engine was at such a distance, and was proceeding at such a moderate rate of speed, as to have permitted the engineer to stop in time to avoid an accident. According to the evidence for the defendant, the plaintiff, when the engine was within 10 feet, or less, of him, attempted to cross in front of it and was run over. The trial court, in its main charge to the jurors, had instructed them that, if they accepted the testimony of the defendant's witnesses, as to the plaintiff going upon the track when the engine was within a few feet of the crossing, he could not recover. But, still more broadly and favorably, at the defendant's request, the trial court further charged that, "if the jury find that the plaintiff, whether *sui juris* or *non sui juris,* failed to exercise such care as was commensurate with his years and intelligence, then the verdict must be for the defendant."

It seems to me very clear, under the circumstances, that the defendant cannot be said to have been prejudiced by the erroneous ruling in question, and therefore the judgment should be affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment affirmed.

SMITH *v.* OGDEN & N. W. R. CO.

(Supreme Court of Utah, Dec. 9, 1907.)

[93 Pac. Rep. 185.]

Railroads—Fires—Commustible Material on Right of Way.*—A railroad company must keep its right of way free from combustible material, and when it negligently permits such material to accumulate thereon, and the same takes fire from a passing engine, and it is communicated to adjoining property, which is injured, without the negligence of the owner, the railroad company is liable.

Same—Railroad Track on Highway.*—A railroad company maintaining its track on a public highway must keep at least such portions of the highway as it occupies and uses in the operation of its railroad, and such portions as may be properly regarded as its right of way, free from combustible material.

Same—Actions—Instructions.—Where, in an action against a railroad company maintaining its track on a public highway for fire set by sparks from its engines and communicated from combustible material in the highway to adjoining property, there was evidence justifying a finding that the fire originated on the right of way, a charge that the railroad company was not responsible for the combustible material in the highway, and was not liable for the damages sustained, was reversible error.

Appeal—Review—Invited Error.—A party cannot complain on the ground that the court charged on a subject neither presented by the pleading nor the evidence, where he requested the court to charge on the subject.

Same.—A party requesting the court to charge on a subject may complain that the court erroneously stated the law, where it was not stated as requested.

Negligence—Contributory Negligence—Burden of Proof.†—Plaintiff is not required to allege and prove, in the first instance, freedom from contributory negligence, and the burden of proving contributory negligence is on defendant, unless it is shown by plaintiff's evidence.

Same.†—Where contributory negligence is shown by plaintiff's evidence, defendant may interpose a motion for nonsuit on that ground, though there is no plea of contributory negligence.

Same.†—Where there is sufficient evidence, whether supplied by

*For the authorities in this series on the subject of negligence in permitting combustibles to accumulate and remain on a railroad right of way, see foot-notes appended to Simpson *v.* Enfield Lumber Co. (N. Car.), 9 R. R. R. 457, 32 Am. & Eng. R. Cas., N. S., 457, where all the preceding ones are collected; foot-notes appended to Atchison, etc., Ry. Co. *v.* Sprague (Kan.), 22 R. R. R. 330, 45 Am. & Eng. R. Cas., N. S., 330.

†For the authorities in this series on the question whether plaintiff

plaintiff or by defendant, on which a charge of contributory negligence may be predicated, the court, at the request of either party, should charge on the subject, though there is no plea of contributory negligence.

Same.—Where there is a plea of contributory negligence, but there is no evidence on which to predicate a charge on contributory negligence, such a charge should not be given.

Same.‡—The general denial puts in issue such of the general averments of the complaint as plaintiff must prove to maintain the action, and under it defendant may introduce any evidence disproving the negligence charged against him, or the causal connection of his negligence and the injury; but a plea of contributory negligence is essential to entitle defendant to introduce evidence of contributory negligence.

Railroads—Fires—Actions—Pleading and Proof—Negligence—Contributory Negligence.‡—A railroad company, in an action against it for fire set by sparks emitted from its locomotives, may, under the general issue, prove that it was not guilty of the negligent acts charged, that the fire was occasioned by persons over whom it had no control, or that plaintiff caused it, and may prove its acts of caution in guarding against the spread of fire, and that the fire, though negligently started, did not reach plaintiff's land, or that an independent cause intervened between its acts and the injury; but it cannot show that plaintiff was guilty of contributory negligence in suffering combustible material to remain on his property in close proximity to the track, or that plaintiff after the discovery of the fire negligently failed to make reasonable efforts to save his property, such acts not being available, unless specially pleaded.

Negligence—Contributory Negligence.§—The duty rests on one who discovers that a fire is advancing towards his property to make every reasonable effort to prevent its destruction.

must allege in the complaint freedom from contributory negligence, see Rambery *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; third foot-note appended to Birmingham Ry., etc., Co. *v.* Hinton (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173.

For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to Coolbroth *v.* Pennsylvania R. Co. (Pa.), 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419, where all the preceding ones are collected; foot-notes appended to Edington *v.* St. Louis, etc., R. Co. (Mo.), 24 R. R. R. 707, 47 Am. & Eng. R. Cas., N. S., 707; McFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56.

‡For the authorities in this series on the question whether it is necessary to plead contributory negligence, see foot-note appended to Brown *v.* Oregon R. & Nav. Co. (Wash.), 20 R. R. R. 595, 43 Am. & Eng. R. Cas., N. S., 595, where all the preceding ones are collected.

§See second foot-note appended to St. Louis, etc., R. Co. *v.* League (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772, where all the preceding authorities are collected.

Smith *v.* Ogden, etc., R. Co

Railroads—Fires—Contributory Negligence—Evidence.—In an action against a railroad company for fire set by sparks emitted from its locomotives, evidence held insufficient to show negligence of plaintiff or his employees in charge of the property destroyed by fire, based on a failure to save the property from destruction after discovery of the fire and its advance towards the property.

Evidence—Opinions—Subjects of Expert Testimony.—Where, in an action against a railroad company for fire set by sparks from its locomotives, it was not impracticable to put the jury in possession of all the facts, it was error to allow hypothetical questions calling for one opinion of witnesses as to the degree of diligence which should have been exercised by plaintiff and his employees in saving the property from destruction after discovering the fire.

Trial—Instructions—Evidence.—Where, in an action against a railroad company for fire set by sparks emitted from its locomotives, there was no evidence of an independent cause intervening between the negligent acts of the railroad company and the injury, and evidence that its negligent acts were the proximate cause of the injury, an instruction that if, after the commission of the negligent acts, there intervened an independent act which caused the injury, the acts were interrupted and were too remote, was erroneous because of the absence of evidence on which to base it.

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by A. R. C. Smith against the Ogden & Northwestern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

George Halverson and *T. N. Kimball,* for appellant.
C. C. Richards and *Van Cott, Allison & Riter,* for respondent.

STRAUP, J. This action was brought to recover damages for the destruction of property by fire alleged to have been caused by the negligence of the defendant in the operation and management of its engine. The particular negligence charged against the defendant was in permitting dry grasses and weeds to be and remain upon its right of way, in failing to equip its engine with a proper spark arrester, and in the manner of handling and operating the engine. The answer was a general denial. A trial before the court and a jury resulted in a verdict for the defendant. Plaintiff appeals.

The defendant's track was maintained upon a public street or highway. Plaintiff's land was 80 or 100 rods north of the track. A Mr. Stephens and a Mr. Ellis owned two parcels of land lying between plaintiff's land and the track. The highway and defendant's right of way were covered with dry June grass, which, at the time of the fire, about the middle of July, readily

ignited. There were also June and other dry grasses on lands adjoining the track and lying between the track and plaintiff's land. On the day in question, as defendant's engine was propelled and operated over its road, a number of fires were started from sparks and coals which were emitted from the engine, one of which fires started at the Stephens land, and others to the east and west of that place. The fire which started at the Stephens land spread from there to plaintiff's land where it destroyed his hay in the stack, his pasturage and his fences. None of the other fires reached his land. That all the fires were caused by sparks and coals emitted from the defendant's engine, there is no substantial conflict in the evidence. That some of the fires which started to the west and the east of the Stephens land originated on the defendant's right of way is also beyond dispute. Whether the particular fire which spread to plantiff's land started from sparks thrown on the defendant's right of way, or from sparks thrown on the Stephens land adjoining the street and right of way, the evidence is conflicting; but there is sufficient evidence in the record to justify a finding by the jury that it started on defendant's right of way. The court charged the jury: "You are instructed that the defendant's railroad, where it passes along the road in the vicinity of the premises sued for by the plaintiff as having been damaged, was in the public highway, over which defendant had no control further than to maintain and operate its railroad, and that if there was dry grass or other combustible material growing in said highway and along the said defendant's said railroad track, or in the fields adjoining such highway, the defendant was not responsible therefor, and cannot be held liable for any damage sustained by the plaintiff, if you find that the plaintiff was damaged, by the setting on fire of such dry grass or other combustible material growing in said public highway, or in the fields adjoining the same, by the sparks from its said engine, provided the said engine was supplied with the most approved apparatus for the prevention of the emission of sparks and coals of fire, and that the engine was in good repair at that time, and operated by a competent engineer with reasonable care and skill at the time the fire was started by said engine, if you find that the engine started the fire."

Plaintiff's exception to this charge must be sustained. From this, as well as other portions of the charge, it will be seen that the court restricted the jury's finding on the question of the defendant's negligence to the allegations with respect to equipment and management of the engine, and entirely took from their consideration the alleged acts of negligence with respect to permitting day grass and combustible matter to accumulate and remain on and along the defendant's railroad track. That it is the duty of a railroad company to keep its right of way free from dry grasses and other combustible materials in order that

fire may not be set out on its right of way, and if it negligently permits dry grasses and other combustible material to accumulate and remain on its right of way, and the same takes fire from one of its passing engines and is communicated to an adjoining farm, where it destroys the property of the owner without negligence on his part, the railroad company is liable, is not questioned by the respondent. As is said by the authorities, the removal of such combustible substances is quite as much a means of preventing the communication of fire from locomotives as is the use of inventions for preventing the escape of fire from the locomotives themselves. The charge evidently was given on the theory that inasmuch as the defendant maintained its tract upon a public highway over which it had no control, no duty was imposed upon it to keep its right of way clear of such combustible substances. But the duty imposed upon it in such case is the same as though it owned the right of way, at least to such portions of the highway occupied and used by it in the operation of its railroad and to such portions as may be properly regarded its right of way. Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660. This principle of law is not, in this court, seriously controverted by the respondent. It is, however, contended by it that the error was harmless, because, as it claims, the evidence shows that the particular fire which spread to plaintiff's land did not start on the right of way, but started from sparks thrown on the Stephens land, and hence its alleged negligence in permitting dry grasses and other combustible material to be and remain on its right of way was not a contributing cause of the injury. Upon this point we have carefully examined the transcript, and while it may be said the evidence pertaining to it is not very direct, still we are of the opinion that there is sufficient evidence to justify a finding that this particular fire originated on the defendant's right of way. The charge of the court was therefore erroneous and prejudicial.

A further complaint is made by the plaintiff because of the court's charging the jury on the question of contributory negligence. This complaint is based upon the ground that contributory negligence was not pleaded, and on the further ground that there was no evidence to justify a finding of such negligence. The plaintiff, however, is not in a position to make such claim, for the reason that he himself requested the court to charge upon the subject. While the plaintiff may still be heard to complain that the court erroneously stated the law, if it was not stated as requested by him, nevertheless he cannot be heard to complain upon the ground that the court charged upon a subject which was neither presented by the pleadings nor the evidence when he himself requested the court to do so. As the judgment must be reversed, and a new trial granted because of the assigned error already reviewed, and as the questions of contributory

negligence attempted to be presented are likely to arise on a new trial, we have concluded to consider them. The rule obtains in this jurisdiction that the plaintiff is not required to allege nor prove in the first instance his freedom from negligence. He is required to allege and prove negligence on the part of the defendant, and that such negligence, as a natural and direct result, occasioned the injury. The burden of proving contributory negligence is upon the defendant, unless it is shown by plaintiff's evidence. When it is shown by his evidence, the defendant may interpose a motion for nonsuit on that ground, although there is no plea of contributory negligence. Bunnell *v.* Railway Co., 13 Utah 314, 44 Pac. 927; Clark *v.* O. S. L. Ry. Co., 20 Utah 401, 59 Pac. 92; Holland *v.* O. S. L. R. Co., 26 Utah, 209, 72 Pac. 940. The plea is not material in support of the motion, for the motion is based on the ground that the plaintiff has not proven the case alleged in his complaint, but has proven facts outside of it and which defeat his right to recover. So, too, whenever there is sufficient evidence in a case, whether supplied by the plaintiff or by the defendant, upon which a charge of contributory negligence may properly be predicated, the court, at the request of either party, should charge upon the subject, although again there is no plea of contributory negligence. Though there be a plea of contributory negligence, yet, if there is no evidence in the case upon which to base a charge of such negligence, none should be given by the court. If there is no evidence either on the part of the plaintiff or the defendant on such issue, the court should not submit that issue to the jury any more than it should submit any other issue to them upon which there is no evidence.

A plea of contributory negligence is essential only to entitle the defendant to introduce evidence in support of such a defense. The general denial puts in issue such of the general averments of the complaint as the plaintiff is bound to prove in order to maintain his action. Under the general issue, the defendant may introduce any evidence which tends to disprove the negligence charged against him, or which tends to disprove the causal connection of his negligence and the injury; but a plea of contributory negligence is essential to entitle the defendant to introduce evidence which does not tend to disprove such facts, but which merely tends to prove negligence on plaintiff's part, concurring and combining with the defendant's negligence, and as a proximate cause contributing to plaintiff's injury. That is to say, the defendant, under the general issue, may not introduce evidence which does not tend to disprove his negligence or its causal connection, or the averments essential to plaintiff's recovery, but which, nevertheless, tends to relieve him of the legal consequences of his negligence. To do so a special plea is necessary. Applying this principle to the kind of case in hand, the defendant, under the general issue, may, among other things, prove: That

it was not guilty of the acts charged. That the fire was occasioned by persons over whom, or from causes over which, it had no control, or that the plaintiff himself caused it. The acts of caution exercised by the defendant in guarding against or preventing the spread of fire. That the fire, though negligently started by the defendant, nevertheless did not reach plaintiff's land or destroy his property, or that an independent cause intervened between its alleged act of negligence and the injury which was the sole proximate cause; and, of course, all other things and causes which tend to disprove defendant's negligence, or the causal connection of such negligence. But the defendant, under the general issue, may not show that the plaintiff was guilty of what in law is termed "contributory negligence." For instance, he may not show that the plaintiff was guilty of negligence in suffering combustible material to be and remain upon his property, or in close proximity to the railroad track, or, after the plaintiff or his servants in charge discovered the fire they negligently failed to make reasonable efforts to prevent its spreading to plaintiff's property or to save it from destruction. Such acts amount to negligence on plaintiff's part, which concurred and combined with the negligence of the defendant, while the latter's negligence was still continuing and causal, and which, together with the plaintiff's negligence, directly, concurrently, and proximately contributed to the injury. While such evidence tends to prove that the plaintiff's negligence was a concurrent and proximate cause, it does not tend to disprove the concurrent and proximate cause of defendant's negligence. It, therefore, does not controvert the facts which plaintiff must establish in order to sustain his action, but only avoids the legal consequences of such facts. And whenever such is the only effect of the proffered evidence a special plea is essential. For these reasons the general rule obtains that the defense of contributory negligence is not available as a defense, if not specially pleaded, unless plaintiff's evidence discloses such negligence. As has been shown, however, the court is not under all circumstances precluded from charging on such subject, because there was no such plea.

This, then, brings us to the further claim made, that there is no evidence in the case tending to show the plaintiff guilty of such negligence. That there is a total want of evidence tending to show the plaintiff guilty of negligence in the first instance is conceded. That is, there is no evidence showing that the plaintiff had anything to do with causing the fire, or that he was in any particular responsible for it, or that he was negligent in maintaining combustible substances upon his premises or near the railroad track, or that he otherwise made a negligent use of his property, or that he was even guilty of negligence in preventing

the fire spreading to his land. The only claim made by the respondent in this respect in that the employees of the plaintiff (10 in number) working in his hayfield stacking hay at the time of the fire, had they not devoted so much effort in attempting to save the hay stacks, and had they directed more attention to the fire along the fence, some or most of the fence posts might have been saved. The law undoubtedly is that when a fire is once started and is discovered by the plaintiff, a duty is resting upon him to make every reasonable effort to save his property. After discovering that the fire has started, and that it is advancing towards his property, the plaintiff cannot negligently stand still and allow the fire to advance and destroy his property, when, with reasonable efforts, he might prevent such destruction, and then be permitted to recover for such a loss. The property owner is bound to use all reasonable efforts to save his property and to minimize his loss, and if, by the use of such efforts, all damages could have been prevented, no recovery can be had. If after discovering the fire all the property could not have been saved, but with reasonble efforts some of it could have been saved, the plaintiff may not recover for the loss of that which could have been saved by such efforts. The evidence shows that a brisk wind was blowing towards plaintiff's property, and that the fire spread to it like prarie fire. The plaintiff was not in his field at the time of the fire, but was at his house. What distance that was from the fire is not made to appear. When plaintiff first discovered the fire, it had swept over the fields and was consuming his haystacks. So far as made to appear, there was not anything that he could have done which would have saved his property. Conceding that the record sufficiently shows that the plaintiff's employees in the field were in charge of his property, and that its care had been intrusted to them in the sense that their negligence should be imputed to plaintiff (Railroad Co. v. McKay, 69 Miss. 139, 12 South. 477), yet, from an examination of the record we have been unable to find any evidence tending to show a lack of diligence on their part. To the contrary, we find evidence showing that they did all in their power to arrest the progress of the fire and to save the property. The transcript of the record consists of over 900 pages of typewriting, and it may be that we have overlooked some of the evidence on this point. But neither party has called our attention to any evidence which would justify a finding that plaintiff's employees did not use all reasonable efforts and diligence in such regard. The only matters to which our attention has been directed consist of answers made over plaintiff's objections by some of the defendant's witnesses to certain hypothetical questions propounded to them. These rulings are also assigned as error, and will be considered later. But, with the answers in the record, the evidence, in our judgment, is wholly insufficient

to justify a finding that plaintiff's employees were guilty of negligence in failing to arrest the progress of the fire, or in saving the property. One of the hypothetical questions propounded to defendant's witnesses by its counsel, and which was permitted to be answered over plaintiff's objections, is as follows: "Q. Assuming that upon a field out here a fire was started in one field and passed along from that on to the next upon which there were 10 men working hay, and after the fire crossed onto the field where they were working, and observing that it was coming, the haystacks, they tried to fight it from the haystacks, but being unable to prevent the burning of the stacks, if they had directed their attention to the fighting of the fire and putting out the posts, the fire had communicated from the June grass stubble to the lucern stubble, growing in the field, in your opinion would 10 men have been able to put out the fire that attacked or started from that field fire in the fencing?" Another was: 'Q. Now, assuming Mr. Smith had 10 men working upon his place stacking his hay at the time that the fire came over from Mr. Ellis' field to his field and burned up that way, and the fire traveling so rapidly that they were unable to do anything towards saving the hay further than to throw it off two wagons and get the wagons out of the way, I will ask you if those men had directed their attention towards extinguishing the fire along the line of those fences of Mr. Smith's where the posts took fire and burned out, if the fire could have been extinguished in those posts in time to have saved them?" The first question was answered in the affirmative. The second was answered: "A. If I understand your question that, that is, that those men would have directed their attention towards saving the posts? Q. The fire came so fast that they discovered they couldn't save the hay, and running the two wagons off on which the hay was standing, to save them, if those men had turned their attention toward the saving of the posts that took fire and had followed the fire up, whether or not those 10 men could have put the fire out as it caught the posts in the fence and saved the posts from burning up, so they would have been practically saved? A. Yes; I think they could." Questions of like kind were also propounded to and simliar answers made by other witnesses. Some of these witnesses also testified that, in their opinion, had less attention been given to the stacks and more to the posts, some or most of them might have been saved by beating and whipping them with sage brush. Some of them also testified that, had they been there, they would have tried to save the haystacks instead of the posts. Such evidence does not tend to show that plaintiff's employees were guilty of negligence. It only tends to show that if the men had not devoted so much effort to the haystacks they might have saved some or most of the posts. One haystack and wagons were saved. Had more attention been given to the fence, these might

have been lost. In such case the hypothetical questions could have been propounded on the theory that too much attention had been given to the fence. Lack of diligence cannot be predicated on the fact that plaintiff's men made more effort to save what appeared to be the most valuable part of the property, and which was most likely to be consumed by the fire, than was made to save property of less value, or, because of mere error of judgment, they did not pursue the wisest course. We, therefore, do not find any evidence upon which a charge of contributory negligence could properly be based.

We pass now to the rulings made admitting this testimony. In the first place, we find that the witnesses did not qualify so as to entitle them to speak on the subject. In the next place, the subject-matter of inquiry was not of such character as to call for expert or opinion evidence, nor did it involve matters of fact which could not be detailed and described to the jury, nor was it impracticable to put the jury in possession of all the primary facts upon which the opinion of the witnesses was founded. Again, the questions embraced and called for the opinion of the witnesses as to the degree of diligence and care, which, under the circumstances, could or should have been exercised by plaintiff's men, the judgment of which matters was within the province of the jury and not the witnesses. We think plaintiff's objections to these questions ought to have been sustained. We see no ground upon which the rulings can be upheld.

Complaint is also made of the following charge on the question of an intervening cause: "Even the natural and probable consequences of a wrongful act or omission are not in all cases to be charged to the misfeasance complained of. They are not thus to be charged where there is a sufficient and independent cause operating between the wrongful act complained of and the injury. If, after the commission or omission of the original act complained of, there intervenes an independent act of other persons, which, in itself, caused the injury complained of, then, in contemplation of law, the original act is interrupted and in law considered too remote, and the intervening act is considered the proximate cause." No complaint is made of the statement of the law in the abstract; but complaint is made that there is no evidence upon which such a charge could properly be predicated. There does not seem to be any evidence of an independent cause intervening between the alleged negligent acts of the defendant and the injury. The injury appears to be the result of the natural and proximate cause of the defendant's negligent act. Nothing is made to appear that the causal connection and continuous sequence of its acts were unbroken or interrupted by any new and efficient cause without which the injury would not have occurred. The only matter to which our attention has been directed as evidence of such a cause is based upon the answers

made by the witnesses to the hypothetical questions just considered. But, as we have seen, such evidence does not tend to show an independent and intervening cause. The questions do not assume that plaintiff's men could have prevented the fire from reaching his property, or that they could have saved it after they had discovered the fire advancing towards it. The questions propounded called for, and the answers made thereto expressed, the opinion that some of the posts could have been saved had more attention been given to them and less to the haystacks. Whatever probative effect ought to be given such evidence, it cannot have the effect of proving an independent and intervening cause. There being no evidence upon which such an instruction could be based, it ought not to have been given. What we have said on this question in the case of Belnap *v.* Widdison (Utah) 90 Pac. 303, to a great extent, applies here.

For the foregoing reasons, the judgment of the court below is reversed, and the cause remanded for a new trial. Costs to appellant.

MCCARTY, C. J., and FRICK, J., concur.

KENNEDY *v.* CHICAGO, B. & Q. RY. CO.

(Supreme Court of Nebraska, Dec. 5, 1907.)

[114 N. W. Rep. 165.]

Railroads—Killing Stock—Evidence.*—The mere killing of an animal by collision with a moving train upon the tracks of a railway company is not evidence of negligence, nor can negligence be established by inference and conjecture in contradiction to the testimony of a competent, unimpeached, and disinterested eyewitness.

Same.—Evidence examined, and held insufficient to support a verdict. Letton, J., dissents to this proposition.

(Syllabus by the Court.)

*For the authorities in this series on the question of whether the mere fact of a collision between a train and stock creates a presumption of negligence against the railroad company, see extensive note, 12 R. R. R. 792, 35 Am. & Eng. R. Cas., N. S., 792; foot-notes appended to Atchison, etc., Ry. Co. *v.* Adcock (Colo.), 25 R. R. R. 769, 48 Am. & Eng. R. Cas., N. S., 769; foot-notes appended to St. Louis S. W. Ry. Co. *v.* Heintz (Ark.), 25 R. R. R. 32, 48 Am. & Eng. R. Cas., N. S., 32.

For the authorities in this series on the subject of the sufficiency of evidence to rebut the presumption of negligence arising from the fact of injury to stock from collision with a train, see extensive note, 12 R. R. R. 792, 35 Am. & Eng. R. Cas., N. S., 792; foot-notes appended to Atlanta, etc., R. Co. *v.* Hudson (Ga.), 18 R. R. R. 490, 41 Am. & Eng. R. Cas., N. S., 490.

Commissioners' Opinion. Department No. 2. Appeal from District Court, Saunders County; Evans, Judge.

Action by Simon Kennedy against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Fred M. Dewese and *Frank E. Bishop*, for appellant.
John H. Barry, for appellee.

AMES, C. This is an action to recover damages for the alleged negligent killing of the plaintiff's cow upon the tracks of defendant company. The plaintiff recovered, and the defendant appealed.

There is no important conflict in the evidence, but it is urged that conflicting inferences of fact are deducible therefrom, and that in such cases such inferences are to be drawn and the preponderance of them determined by the jury, and not by the court. The occurrence happened within the defendant's depot grounds or yards, which were not fenced nor required so to be by law. There were five or six cows of the plaintiff on the grounds at the time, all of which it appears had gone there a short time previously. The locomotive engineer is the only witness who testified to having seen the accident, or the animal, immediately before the former happened. He saw only that cow and one other which he says were standing near each other on the defendant's right of way, and about 20 or 30 feet from the track, and that, when the train was about 150 feet away and moving at a speed of about 20 miles an hour, the animal that was killed suddenly left her companion, and bolted upon the track immediately in front of the engine. It is not claimed that the rate of speed was in itself excessive or needlessly dangerous, and the engineer testified to having kept an ordinary lookout along the track in front of him, and to have seen no other animals, and that he had no reason to anticipate the strange and unprecedented conduct of the cow, and did not become aware of it until the instant of the collision. For that reason, he did not sound an alarm whistle or make a sudden or what is called an emergency stoppage of the train or slaken its speed. Within what distance such a stop could have been made the record does not disclose, but it was testified that a "service" stop could have been effected in 300 feet. The cow was unquestionably a trespasser, and the rule of law is well settled and undoubted that for the killing of or injury to an animal under such circumstances a railroad company is not liable, unless the casualty is due to the gross or wanton negligence of its servants or employees in omitting such precautions as a reasonably capable and prudent man would employ to avert danger or prevent an obviously impending castrophe. Young *v.* Railroad Co., 79 Mo. 336; Railroad Co. *v.* Wendt, 12 Neb. 76, 10 N. W.

456. The gist of the action is negligence, which is not to be presumed, but must be proved, and, in this case, of negligence in an unforeseen, and not to have been anticipated emergency. We think it quite clear that, if the story of the engineer is true, the obligation of the plaintiff with respect to the burden of proof has not been met, and that the evidence is insufficient to support the verdict. That story is not directly contradicted, but the plaintiff produced witnesses who saw five or six of his cows go upon the defendant's right of way and into the yards, and who testified that after the accident happened they had followed and traced the tracks of the animals from the place of their entry to that of the killing, and that the tracks showed that the animals, or some of them, had walked that distance upon the defendant's roadbed, and from this fact and the further fact that the accident happened, as they ascertained, by "stepping" some 400 feet nearer the place of entry than the engineer guessed that it did, counsel infer and argue that the jury were justified in inferring that the engineer testified falsely, or at least mistakenly, in saying that the animal killed was one of those that he saw standing beside the track; and contend that it was one walking on the roadbed, towards the train from the point of entry, which they say was 600 feet, and the engineer guessed was "about" 1,000 feet from the place of the collision, and from this inference they deduce the further inference that, if the engineer had kept a reasonably careful or vigilant outlook along the railway track ahead of his train, he would have seen the cow in time to have stopped his engine, or to have frightened her away and so have averted the casualty. It seems to us that such a building of inference upon inference is too unsubstantial a structure for the support of a verdict, especially when the inferences are contradicted by the direct testimony of a competent and unimpeached, and, so far as appears, disinterested, eyewitness. To hold otherwise would, it appears to us, quite overthrow the rule announced by this court in Railroad Co. *v.* Wendt, supra, that the mere killing of the animal is not evidence of negligence, and to permit a recovery to be had upon a theoretical conjecture the product rather of imagination than of fact.

We therefore recommend that the judgment of the district court be reversed, and a new trial granted.

CALKINS and JACKSON, CC., concur.

LOUISVILLE & N. R. CO. *v.* MOLLOY'S ADM'X.

(Court of Appeals of Kentucky, Jan. 29, 1908.)

[107 S. W. Rep. 217.]

Railroads—Accidents at Crossings—Question for Jury.—Evidence, in an action for the death of one who was killed at a railroad crossing by a train, held to authorize the submission of the case to the jury.

Evidence—Weight and Sufficiency—Negative Testimony.*—Though negative evidence ordinarily is not of the same weight as positive, yet evidence of those who had an opportunity to hear that they did not hear any signals given by a train for a crossing is admissible, and the weight to be given it is for the jury.

Railroads—Accidents at Crossings—Evidence—Sufficiency.—Evidence, in an action for the death of one who was killed at a railroad crossing by a train, held not to show as a matter of law that decedent knew or ought to have known that the train was approaching.

Negligence—Contributory Negligence—Perilous Position.†—One whose position of peril is not occasioned by his own negligence has the right to make a choice as to the means to be used to avoid the peril, and an unwise choice does not constitute contributory negligence.

Courts—Rules of Decision—Previous Decision in Same Case.—The facts being substantially the same on both trails of a cause, the law as indicated in the opinion of the Court of Appeals on appeal from the judgment on the first trial is the law on the second trial.

Appeal from Circuit Court, Barren County.
"Not to be officially reported."

Action by Sam C. Molloy's administratrix, for intestate's death, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield, C. H. Moorman, and *Sims, Du Bose & Rodes,* for appellant.

T. W. & R. C. P. Thomas, Greer & Marble, and Baird & Richardson, for appellee.

*See foot-notes appended to Cotton *v.* Willmar & S. F. Ry. Co. (Minn.), 25 R. R. R. 501, 48 Am. & Eng. R. Cas., N. S., 501; foot-notes appended to Schwarz *v.* Delaware, etc., R. Co. (Pa.), 25 R. R. R. 10, 48 Am. & Eng. R. Cas., N. S., 10; Winterbottom *v.* Philadelphia, etc., R. Co. (Pa.), 25 R. R. R. 8, 48 Am. & Eng. R. Cas., N. S., 8.

†See foot-notes appended to Alabama City, etc., Ry. Co. *v.* Bates (Ala.), 23 R. R. R. 564, 46 Am. & Eng. R. Cas., N. S., 564.

CLAY, C. This is the second appeal of this case. The opinion on the first appeal will be found in 91 S. W. 685, 28 Ky. Law Rep. 1113. On the 27th day of March, 1904, Sam C. Molloy, an attorney, on his way to Brownsville to attend court the next day, reached Glasgow Junction on the morning train, and hired L. H. Oller, a liverman, to take him over to Brownsville in a buggy. They started for Brownsville at about 12 o'clock. From the hotel from which they started the road to Brownsville runs for about a quarter of a mile parallel with the Louisville & Nashville Railroad Company's track, and then turns abruptly to the right, going up a slight incline across the railroad track. When the horses reached the track, a freight train going south, running rapidly, struck the horses and the vehicle, killing Molloy, and seriously injuring Oller. On the first trial of the case Molloy's administratrix recovered a judgment for $9,000. This judgment was reversed. Upon the second trial she obtained a verdict of $5,000. From the judgment entered thereon, this appeal is prosecuted.

A very full and accurate statement showing the circumstances of Molloy's death, as well as the surroundings at the place of the accident, is contained in the opinion above referred to. The evidence in the record before us is substantially the same as that contained in the former record. The evidence for the appellee is as follows: Molloy was a stranger at Glasgow Junction, where the accident occurred; had never been there before. He did not know the way, or the time of the arrival of the train. Before getting in the buggy he looked to see if a train was coming, and inquired if one was coming. The train that killed him was the second section of No. 11. It had no schedule time, and was late. No one knew it was coming. Molloy was sitting on the right side of the buggy, the top of which was partly up. The road over which they traveled from the Mentz hotel to the crossing was parallel, or nearly so, with the railroad. The road was rough until within a short distance of the crossing. The horses traveled in a trot at the rate of four or five miles per hour. The buggy was going in the same direction as the train —towards the south. The backs of the occupants of the buggy were towards the train leaving the Mentz hotel. On account of the passenger and freight depots and other obstructions the train of cars could not be seen until after reaching the passenger depot. The distance between the passenger depot and the crossing was 1,200 feet. The train was running at from 30 to 45 miles an hour. It had about reached the passenger depot when the buggy was approaching the crossing. The speed of the train was 8 or 10 times faster than that of the buggy. The engine was some 600 feet from the crossing when the engineer leaned out of his cab and waved to a lady. No signals were given for the crossing. No bells were rung, nor whistle blown after reaching

the Hazelip crossing, which was north of the passenger depot. The engine, after striking the buggy, ran about 2,400 feet, or nearly half a mile. Neither Molloy nor Oller saw the train until the buggy was about 20 feet from the track. At the time of reaching the track the horses had slowed down to a walk. When the buggy was about 20 feet from the track, Oller looked in one direction and Molloy in another. Molloy then said: "Whoop, whoop, there is the train." By that time one of the horses had his feet over the track. Molloy grabbed the lines, and attempted to escape the impending danger by pulling the horses off the track. At that time he was struck and killed. On the other hand, the evidence for the appellant is as follows: From 7 to 9 blasts of the whistle were given between the tunnel and the passenger depot. The train of cars made much noise. The blasts of the whistle above the passenger depot could have been heard, and were heard about a mile. The bell was rung continuously from the tunnel to the crossing. Molloy, or one of the men in the buggy, whipped the horses, and apparently attempted to defeat the train in a race to the crossing. There is no obstruction south of the passenger depot. Then engineer did not see the buggy until the horses were on the track. The train could not have been stopped in time to prevent the injury after the engineer discovered the dangerous position of Molloy. Then engineer admitted waving to the lady in passing, but claimed it was only for an instant. The only difference between the testimony in the record before us and that on the former trial is that Oller, on the first trial, stated that the horses were going four or five miles an hour when the crossing was reached, while on the second trial he stated that the horses had slowed down to a walk when they reached the crossing. On this account counsel for appellant contend that the opinion of this court on the former appeal is not conclusive of the questions involved in this appeal. Whether viewed from this standpoint, or in the light of an original question, we are of opinion that the evidence was sufficient to authorize a submission of the case to the jury. If it be true, as said by Oller on the second trial, that the horses had slowed down to a walk when the crossing was reached, this is evidence not of greater negligence on the part of the occupants of the buggy, but of greater precaution for their own safety.

But counsel for appellant argue most earnestly that the verdict is flagrantly against the evidence. They contend that as several persons testified that the train was making a great deal of noise, the bell was being rung, and the whistle blown, all of which noise made by the train was heard by parties who were a great deal further away than Molloy and Oller, the latter must of necessity have heard the train, and if they heard the train, and knew that it was approaching, they were certainly guilty of contributory negligence in going right on the track under such

circumstances. They further contend that no effect should be given to Oller's statement that he did not hear the train approaching, for the reason that he was partially deaf. We are unable to say, however, as a matter of law, that Molloy did hear, or ought to have heard, the train approaching. Several witnesses testified that, although they had their minds on, or their attention directed to, the train, they heard no signals given for the crossing. On the other hand, several witnesses testified that the signals were given. It is insisted that the former evidence, being of a negative character, should not outweight the affirmative evidence to the effect that the usual and customary signals were given. While it is true that negative evidence ordinarily is not of the same weight as positive evidence, yet under the rule established in this state this kind of evidence is admissible, and the weight to be given to it is for the jury to determine. In many instances the only evidence of a failure to ring the bell or blow the whistle that could be introduced is the statements of those who had an opportunity to hear, and did not hear, the signals given. If such evidence were excluded, it would be impossible to prove a failure on the part of those in charge of the train to give the necessary signals. Chesapeake & Ohio Railway Co. *v.* Nipp's Adm'x, 100 S. W. 246, 30 Ky. Law. Rep. 1131. If, then, no signals were given for the crossing in question, appellant was certainly guilty of negligence. But counsel earnestly contend that if Oller's statement be correct that the horses had slowed down to a walk when within 20 feet of the track, then all that Molloy had to do when he seized hold of the lines was to stop the horses, or pull them back, or get out of the buggy, and thus avoid the danger; that it is not a case of suddenly being placed in danger by the negligence of another, and then being compelled to choose instantly, but a case where by his own negligence he was placed in danger. When Oller's statement, however, is considered in connection with all his testimony, it is evident that he meant that he and Molloy, and not the horses, were 20 feet from the track when the train was discovered. This being the case, the forefeet of the horse were within 8 or 10 feet of the track. Just a step or two would place their feet over the track. As we cannot say as a matter of law that Molloy knew, or ought to have known, that the train was approaching, it does not follow that his position of peril was occasioned by his own negligence. Therefore he had the right to make a choice as to the means to be used to avoid the peril, and the fact that he made an unwise choice will not make him guilty of contributory negligence. Former opinion, 91 S. W. 685, 28 Ky. Law Rep. 1113.

The only other complaint made by counsel is of the instructions. Four of the instructions, which were approved by this court in the former opinion, were given upon the second trial. The errors pointed out in the other instructions were eliminated

upon the second tial. One instruction, asked upon a former trial, and refused, was directed to be given, and was given upon the last trial. The only errors pointed out in the instructions given upon the second trial were expressions used in those portions of the instructions which were not criticised, but were approved, in the former opinion of this court. The facts of the case being substantially the same upon the two trials, the law as indicated in the former opinion of this court was the law upon the second trial. For that reason the instructions offered by appellant were properly refused by the court. Cleaver *v.* Louisville & Nashville Railroad Co., 100 S. W. 223, 30 Ky. Law Rep. 1059.

Perceiving no substantial error in the record, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. *v.* BRYANT.

(Supreme Court of Arkansas, Jan. 7, 1907.).

[99 S. W. Rep. 693.]

Railroads—Injuries to Persons Near Track—Trespassers.*—One walking along a path on the right of way of a railroad was a trespasser to whom the operatives of a train owed no positive duty of care, but only the duty to exercise ordinary care not to injure him after discovering him in a perilous position.

Same—Evidence—Sufficiency.—Where plaintiff, walking on a railroad right of way, was injured by being struck by an article thrown from a boarding car attached to a passing train, the article having been thrown by the foreman of a bridge gang and the cook, their testimony that they did not see plaintiff at the time was consistent and reasonable, so that the jury were not entitled to arbitrarily disregard it, as it was not their duty to keep a lookout for persons on the track.

Master and Servant—Injuries to Third Persons—Scope of Employment.†—Where the foreman of a bridge gang employed by a railroad threw from a moving train a water cooler belonging to him,

*For the authorities in this series on the subject of the care due from trainmen to licensees and trespassers on railroad right of way, see foot-notes appended to Louisville & N. R. Co. *v.* Daniel (Ky.), 25 R. R. R. 493, 48 Am. & Eng. R. Cas., N. S., 493; Teakle *v.* San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

†For the authorities in this series on the question, what acts are, and are not, within the scope of employment of a railroad employee, see foot-notes appended to Sawyer *v.* Norfolk & S. R. Co. (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530.

whereby plaintiff was injured, and there was no evidence tending to show that it was in the line of his duty to provide appointments for the cars, his act was not one for which the railroad company could be held liable as within the scope of his employment.

Appeal from Circuit Court, Monroe County; George M. Chapline, Judge.

Action by James Bryant against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

James Bryant was a laborer on his father's farm through which appellant's railroad ran. On July 14th between 1 and 2 o'clock in the afternoon, appellee was going to his work on the farm, and was walking along a path near the railroad track. A freight train passed, to which was attached a boarding car on which was a bridge gang. Nelson was the foreman of the gang and was in the employ of the appellant at the time, doing bridge work. He told the cook in his employ to throw off of the car an old water cooler that had become worthless. The foreman said he supposed the water cooler belonged to him. The man who had the outfit before he came into possession of it was discharged, and the cooler was with the outfit when Nelson took charge. He directed his cook to give it to some one along the track, that if he saw any one to whistle, and give it to them. As they were passing along through the Bryant farm they saw some one in the field. Nelson whistled, the party looked up and the cook put the cooler out of the door. Neither the foreman nor the cook, according to their evidence, saw the appellee. They saw other parties in the field, and the foreman whistled to attract their attention, and, when they looked up, the cook put the cooler out of the door. The train was running about 15 miles per hour. Neither the foreman nor the cook could see the appellee from where tthey were in the car. The foreman was about midway the car and the cook could not have seen appellee unless he had put his head out of the door. The cooler was put out of the door as they passed along. The cooler weighed 40 pounds. It fell upon appellee's head and shoulder and injured him very severely. Appellee and his witnesses testified that the parties on the freight train could have seen appellee. He was in plain view, and, if they had looked, they could have seen him. When the cook threw the cooler out he said: "I have hit a man." The foreman and the cook looked back and saw that a man had been hit. They did not notify the conductor or engineer, and did not stop the train and go back to ascertain the injury done. Appellee sued appellant for damages for the injuries thus received, alleging the negligence of appellant. Appellant denied negligence, and denied its liability for the injuries received by

appellee. The court at the request of appellee instructed the jury as follows: "The jury are instructed that, if they find from a preponderance of the evidence in this case that the employees of defendant company, while working for defendant, were disposing of, or casting aside, a water cooler from defendant's cars and did so in such a reckless, willful and wanton manner as to throw same upon the plaintiff, and if you further find that the plaintiff was in plain view of said employees at the time it is alleged they so recklessly, willfully, and wantonly threw same upon him, you will find for the plaintiff, and assess his damages in such sum as will compensate him for his pain and suffering and injuries as has been shown by the evidence. You are instructed that, in order to hold the defendant liable in this case that the burden of proof is on the plaintiff to show willful and wanton negligence on the part of the defendant company, which negligence directly caused or contributed to plaintiff's injury, and all the circumstances are to be taken into account when the question involved is one of negligence, as in this case; and negligence in a legal sense is no more nor less than a failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other persons suffer injury." The appellant requested the court to give the following: "The jury are instructed to return a verdict for defendant." This the court refused and appellant excepted.

The court gave, over the objection of appellant, the following: "(1) If you find from the evidence in this case that the employees of defendant threw a water cooler from the car because it was damaged, and that at the time it was thrown the party throwing it did not see the plaintiff, and did not know of his position at the time, then the defendant would not be liable, and you will find for the defendant. (2) If you find from the evidence that the party who threw the cooler from the train was in the employ of the employee of the defendant company, and the employee directed the party to throw the cooler out, it would be the act of the employee, and the company would be liable for injury inflicted, provided you further find that the perilous position of the plaintiff was known to the employee at the time. (3) All these instructions are taken together. There are two or three issues in this case. On the part of the plaintiff it is contended that the defendant knew the perilous position of this party. If you believe that to be established, it is your duty to find for the plaintiff. The other is that it was thrown out without the knowledge of his perilous position. If you find that to be the case, you will find for the defendant." The verdict and judgment were for $425. A motion for new trial assigning all the alleged errors reserved at the trial was filed and overruled.

Sam H. West and *J. C. Hawthorne,* for appellant.
C. F. Greenlee, for appellee.

WOOD, J. (after stating the facts). Appellee had no right upon appellant's right of way and especially to be walking upon a path in such proximity to appellant's railroad track at time when one of its trains was passing thereon. In so doing he was a trespasser, and appellant owed him no positive duty of care, and only the negative duty to exercise ordinary care not to injure him after his perilous position was discovered. Johnson *v.* Stewart, 62 Ark. 164, 34 S. W. 889; Railway *v.* Underwood, 74 Ark. 610, 86 S. W. 804; Railway *v.* Neeley, 63 Ark. 636, 40 S. W. 130; Burns *v.* Railway, 76 Ark. 10, 88 S. W. 824; Railway *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50; Penn. Ry. Co. *v.* Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361; McGrath *v.* Railroad (Minn.) 77 N. W. 136; Fletcher *v.* Railway, 18 Sup. Ct. 35, 42 L. Ed. 411; Poling *v.* Ohio R. R. Co. (W. Va.) 24 L. R. A. 215.

It was in no sense the duty of Nelson, the foreman of the bridge gang, or his cook, to "keep a lookout" for persons on the track. That duty devolved upon the employees who were operating the train. As the keeping of a lookout was not in the line of the employment of the foreman of the bridge gang and his cook, their testimony that they did not see appellee at the time of casting the cooler from the car is entirely consistent and reasonable, and the jury could not arbitrarily disregard it. Kansas City So. Westn. Ry. Co. *v.* Ben Lewis (Ark.) 97 S. W. 56; St. L., I. M. & So. Ry. Co. *v.* Landers, 67 Ark. 514, 55 S. W. 940, and cases cited there. It is not like those cases where the fireman, engineer, or other employee, whose duty it is to keep a lookout, swear that they did not, although in the discharge of their duty, see a person in plain view upon the track. In such cases, the jury might well conclude that the testimony was inconsistent and unreasonable, and refuse to believe it. But here the testimony, uncontradicted, disclosed an unfortunate, but nevertheless real, accident. The presence of appellee so near the track was not and could not have been reasonably anticipated by the foreman and his cook.

The court should have given appellant's request for peremptory instruction. The instructions given were abstract, because, as matter of law, upon the undisputed evidence there was no question of willful, wanton, or intentional injury to be submitted to the jury. Moreover, the casting of the cooler from the car was clearly an act of the scope of the foreman's employment. If the cooler belonged to the foreman, as the proof tends to show, he could do as he pleased with it, and, if he negligently cast it from the car, it was his act and not that of the company. His employment with the company was that of building bridges. So far as the proof discloses there is nothing to show that it was

in the line of the duty of the foreman of the bridge gang to provide appointments for the cars in which he was transported from place to place. The burden was upon the appellee to show appellant's liability. To discharge this burden it was incumbent upon appellee to show that the act of the servant causing the injury was negligent and in the course of his employment. Railway *v.* Grant, 75 Ark. 587, 88 S. W. 580, 1133.

For the error indicated, the judgment is reversed, and the cause remanded for further proceedings.

MCCULLOUGH, J., not participating.

HARRIS *v.* SOUTHERN RY. CO.

(Supreme Court of Georgia, Oct. 8, 1907.)

[58 S. E. Rep. 873.]

Negligence—Pleading.*—General allegations that a plaintiff was injured by reason of the negligent conduct of a railroad company, or the like, unless accompanied by allegations of fact showing negligence, are subject to special demurrer.

Railroads—Accident at Crossing—Contributory Negligence.†—Al-

*For the authorities in this series on the subject of pleading negligence, see foot-notes appended to Jacksonville Elec. Co. *v.* Schmetzer (Fla.), 23 R. R. R. 602, 46 Am. & Eng. R. Cas., N. S., 602; Clippard *v.* St. Louis Transit Co. (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107.

†For the authorities in this series on the question whether there may be a recovery for injuries sustained in an attempt to cross railroad tracks in front of a car or train which the injured person knew was approaching before he made the attempt to cross, see foot-notes appended to O'Brien *v.* St. Paul City Ry. Co. (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323; Hutchinson *v.* Missouri Pac. Ry. Co. (Mo.), 22 R. R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683; foot-notes appended to Weinberger *v.* North Jersey St. Ry. Co. (N. J.), 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351; foot-notes appended to Illinois Cent. R. Co. *v.* Willis' Adm'r (Ky.), 22 R. R. R. 312. 45 Am. & Eng. R. Cas., N. S., 312; foot-notes appended to Keller *v.* Erie R. Co. (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; Cranch *v.* Brooklyn Heights R. Co. (N. Y.), 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610; Kannenberg *v.* Conestoga Traction Co. (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80.

For the authorities in this series on the subject of the combined effect of contributory negligence and negligence with respect to the speed of train or car, see foot-notes appended to Illinois Cent. R. Co. *v.* Ackerman (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76.

For the authorities in this series on the subject of the combined effect of negligence and contributory negligence in actions for injuries sustained at railroad crossings, see foot-notes appended to Baker *v.* Tacoma Eastern Ry. Co. (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.

For the authorities in this series (master and servant cases omit-

though the agents of a railroad company may be negligent in running its engine and cars at a high rate of speed over a public road crossing, and in approaching a station where the train is to stop, and in not keeping a lookout, yet if a person, with knowledge of the impending danger, steps on the track and seeks to cross immediately in front of the engine, and is injured, he cannot recover.

Same.—Under the rule that pleadings are to be construed most strongly against the pleader, the case made by the petition was substantially as set out in the preceding note, and a demurrer to it was properly sustained.

(Syllabus by the Court.)

Error from Superior Court, Crawford County; W. H. Felton, Jr., Judge.

Action by Z. T. Harris against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Z. T. Harris brought suit against the Southern Railway Company, alleging substantially as follows: On the 9th day of November, 1905, plaintiff was injured by an engine operated by the defendant company; "Said injury being caused by the negligent running of the said engine, and being caused without any negligence on the part of petitioner." The plaintiff had a contract to carry the United States mail from Roberta to Knoxville. He was also a hotel keeper at Roberta, and both of these occupations required his attendance at the depot of the defendant company upon the arrival of passenger trains. On the day mentioned, in the performance of his duties, he left the hotel to go to the depot of the defendant company, and in order to do so it was necessary to cross the railroad track at the depot. "As the plaintiff stepped upon the track, the engine of the north-bound passenger train struck the plaintiff," inflicting injuries upon him. The place where the engine struck him was a point along the track located almost at the depot, near the point where the trains always stop to receive passengers. A few yards south of this point there is a public crossing, which constitutes a part of the main thoroughfare of the town of Roberta, and is used constantly by the citizens. The train had to pass over the crossing before striking the plaintiff. The defendant was negligent in approaching the crossing at such a high rate of speed that it was impossible for the engineer operating it to stop the train within a sufficiently short distance to be safe for the public using the crossing. If the engineer had approached the crossing at such rate of speed as would have enabled him to control the train, as

ted), on the subject of contributory negligence and assumption of risks where persons knowingly expose themselves to danger, see foot-notes appended to Pegram *v.* Seaboard Air Line Ry. (N. Car.), 22 R. R. R. 481, 45 Am. & Eng. R. Cas., N. S., 481.

the law required and as the safety of the public demanded, the plaintiff would have crossed the track in safety.

By amendment the plaintiff alleged as follows: It was well known to the defendant and its engineer that the plaintiff was in the habit of crossing at the point where he was struck. It was in an incorporated town, and at a place where people congregated and assembled at the time when this train was due to arrive. Plaintiff used ordinary care, and would have succeeded in crossing in safety, but for the fact that the locomotive was running at an unusual and excessive rate of speed—at such a negligent rate of speed as this plaintiff did not know of and could not necessarily have anticipated. At the time he stepped upon the track he was far enough ahead of the engine to have been seen by the engineer, and for the engineer to have checked his speed, so as to have prevented the striking of the plaintiff and the injuries which were inflicted upon him. The negligence of the defendant and its engineer consisted in running the train at a negligent rate of speed at the place and under the circumstances named, and in not keeping a lookout at the time and place mentioned, "by which plaintiff could have been seen and the speed of the train checked, so as to have avoided the striking of the plaintiff." The crossing is part of the street in an incorporated town, and all that part of the railroad from the crossing to the station, beyond the point where plaintiff was injured, is and has been for many years used as a thoroughfare by the public in approaching the station, and that part of the road between the street and the station is constantly used by the public, all of which was well known to the defendant. The point at which the train struck the plaintiff was 25 yards north of the public crossing and 10 yards south of the depot. The train was going at such a rate of speed "at this point" as to be dangerous to passengers and to constitute negligence as to all persons whose business required that they cross the track of the defendant company at this point. Plaintiff was under contract with the United States government to deliver and receive the mails transported by the defendant. The railroad was also under contract with the United States government to transport the mails to and from the town of Roberta. By reason of this employment the plaintiff's presence was necessary at the depot of the defendant company upon the arrival and departure of its passenger trains as alleged.

The defendant demurred to the declaration, both generally and specially. The demurrer was sustained, and the plaintiff excepted.

A. C. Riley, L. L. Brown, and *H. A. Mathews,* for plaintiff in error.

Arthur Heyman, A. J. Danielly, and *C. E. Battle,* for defendant in error.

LUMPKIN, J. (after stating the fact as above). 1. The special demurrer attacks almost every allegation in the petition. As we shall affirm the judgment sustaining the general demurrer, it will not be profitable to deal at length with the various grounds of the special demurrer. Some of them were well taken, and some were not. The plaintiff in his petition must allege facts, not merely conclusions. General allegations that the defendant was negligent, or that the plaintiff was injured by the negligent conduct of the defendant, or the like, will not alone withstand a special demurrer. The pleader should state wherein the negligence consisted. He must plainly, fully, and distinctly set forth his cause of action. If he has done this, he is not required to enter into elaborate statements of minutiæ. If he sets forth the negligent conduct complained of, a subsequent reference to it as the negligence above stated, or "above enumerated," does not render the petition demurrable.

2. Ordinarily a person who is injured by a railway train is not required to allege as a part of his case that he was without fault or negligence; but, if the facts alleged in his declaration show that he was wanting in ordinary care, the point may be raised by demurrer. It is a familiar rule that pleadings are to be construed most strongly against the pleader. In the light of this rule, how stands the plaintiff's case? He alleges that the defendant's train was running very rapidly in passing over the crossing and approaching the station close by; that there was negligence, both in not having the engine under control and in not keeping a lookout. But what does he show as to himself? He does not deny that he saw the engine approaching at a rapid rate of speed, or that he knew that the speed was not checked, or that there was no lookout kept. Indeed, so far as the petition shows, he is to be taken as having full knowledge of the dangerous position he assumed in going upon the track. He alleges that the engineer could have seen him, and it would seem that he could as easily have seen the engine. He says generally that there was "such a negligent rate of speed" as he did not know of; but he does not say that he did not see the rapidly moving train. It does not appear how far distant the engine was when he undertook to cross, but apparently he stepped immediately in front of it, since he alleged that "as the plaintiff stepped upon the track the engine of the north-bound passenger train struck the plaintiff." If it struck him as he stepped upon the track, he must have gone on the track very close in front of it. It was not stated whether the engine had already passed beyond the road crossing before he made his attempt to go in front of it. We have, therefore, presented to us a case where the plaintiff voluntarily went upon a railroad track immediately, or almost immediately, in front of a rapidly moving train, with knowledge of the danger, and miscalculated on his ability to cross the track before being

struck. Such a declaration does not authorize a recovery. Thomas *v.* Central of Georgia Ry. Co., 121 Ga. 38, 48 S. W. 683; Atlanta Railway & Power Co. *v.* Owens, 119 Ga. 833, 47 S. E. 213; Ivy *v.* East Tenn., etc., Ry. Co., 88 Ga. 71, 13 S. E. 947.

Under the ruling above made, it is not necessary to discuss the effect of the law in regard to public crossings in determining the question of the existence of negligence on the part of the railroad relatively to persons who are near such crossings.

Judgment affirmed. All the Justices concur.

MINOT *v.* BOSTON & M. R. R.

(Supreme Court of New Hampshire, Merrimack, May 7, 1907.)

[66 Atl. Rep. 825.]

Witnesses—Credibility.—Though in an action for the death of one crossing a railway track plaintiff's witnesses were mistaken or did not recollect the customary movements of the locomotive, the jury might find they were entitled to credit in other particulars.

Railroads—Person Crossing Track—Question for Jury.—Whether decedent was guilty of contributory negligence, barring recovery for her death caused by being struck by a railway train while crossing the track, held a question for the jury.

Trial—Instructions—Refusal—Prominence to Testimony.—In an action for death to one while crossing a railway track, an instruction that upon the undisputed evidence decedent was familiar with the movement of the trains at that point, and walked onto the track without attempting to learn whether the train which struck her was moving, and in so doing was negligent, preventing recovery unless an ordinarily prudent person would have understood there was no danger of the train backing when she undertook to cross, that a person of ordinary prudence could not so understand unless the train customarily stood on a siding at the time, and that hence, if the train did not customarily pull onto the siding after arriving and remain there for considerable time, verdict must be for the company, was properly refused as giving undue prominence to testimony.

Same—Argumentative.—The instruction was also properly refused as being argumentative.

Railroads—Persons Crossing Track—Action for Death—Instruction.—The instruction was also properly refused for diverting attention from the proposition that if her knowledge of the customary movements of the train was such as to reasonably induce the belief the train had gone onto the siding to remain for some time, and the bell was not rung as the locomotive was about to start, she

might reasonably be regarded as without fault for failing to observe the trains approach.

Same.—In an action for the death of one while crossing a railway track near a station, an instruction that, if the movements of a train at that point at that time of day were variable and uncertain, decedent was not justified in stepping upon the track without looking to see whether, the train was in motion, was properly refused for diverting attention from testimony as to the company's rules requiring warning to be given when the locomotive was about to be moved and as to its control while in motion, and the probable knowledge acquired by decedent regarding those matters from her habitual observations.

Same—Licensees.*—One killed while crossing a railway track along a footpath which had been used by the public and the defendant's employees for many years was not a trespasser.

Same—Evidence—Admissibility.†—Where, in an action for the death of one crossing a railway track, decedent's knowledge of the movement of trains at that point was material, it was not error to admit evidence that the train's movements for four or five years prior to the accident had been the same as at that time, since the uniformity of custom probably impressed decedent, who resided near the station and habitually observed the train's movements; whether the testimony should have been limited to a briefer period being a question within the trial court's discretion and not subject to review.

Appeal—Review—Harmless Error—Admission of Evidence.—In an action for the death of one crossing a railway track on cross-examination of the conductor and the engineer of the train causing decedent's death, the company was not prejudiced by plaintiff. while attempting to show that certain of the company's rules applied where a train was backed as in this case, reading the rules in the jury's hearing and asking questions as to their application, where the witnesses testified that two of the rules did not apply to backing trains and neither was offered in evidence, where one of the rules was in substance the same as another put in evidence by plaintiff and obviously applicable and the other was immaterial.

Exceptions from Superior Court, Merrimack County; Pike, Judge.

Action by James Minot, administrator, against the Boston & Maine Railroad. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

The decedent, a woman 63 years old and in full possession of

*For the authorities in this series on the question, who are, and are not, licensees on railroad tracks or premises, see foot-notes appended to Keller v. Erie R. Co. (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; foot-notes appended to Peterson v. South & W. R. R. (N. Car.), 22 R. R. R. 355, 45 Am. & Eng. R. Cas., N. S., 355.

†See preceding case, and foot-note.

her faculties, was run over and killed about 1 o'clock in the afternoon of August 7, 1902, while crossing the tracks in the defendants' yard at Cherry Mountain by a train that was backing over a siding. The passenger station at Cherry Mountain is located northerly of the defendants' main line running from Whitefield Junction in an easterly direction to Berlin, in the angle formed by this line and their branch line running from it in a northeasterly direction to Jefferson Hill. The station is surrounded by a platform elevated slightly above the level of the rails and extending to the main track on the south, the branch track on the north, and nearly to the junction of the two tracks on the west. A side track runs from a point in the branch line north of the station in a westerly direction, northerly of the branch track, to a point in the main line 1,000 to 1,200 feet distant, with a slightly descending grade toward the station. There are side tracks southerly of and connected with the main line. A footpath leads from a point southerly of all the tracks, in a northerly direction across the tracks and the platform westerly of the station, to a point northerly of the branch siding. The plaintiff's testimony tended to prove the following additional facts: The footpath had been used by the public and the defendants' employees for many years. The decedent resided some 200 feet southerly of the Cherry Mountain station and habitually observed the movements of trains there. She was accustomed to use the footpath, and had used it on previous occasions when the Jefferson Hill train stood on the branch siding. A passenger train was due to arrive at the station from Jefferson Hill 10 minutes before 1 o'clock in the afternoon of each week day. This train, consisting of a locomotive numbered 807 and a combination passenger and baggage car, customarily pulled onto the branch siding after its passengers had alighted, and remained there until some time between 4 and 5 o'clock, when it returned to Jefferson Hill by backing up the branch line. The train or its locomotive did no shifting or other service in the meantime. Five witnesses produced by the plaintiff testified, in substance, to these facts, representing that they had opportunities for observing them. One of them testified that before returning to Jefferson Hill a Pullman car was added to the train. On the day of the accident the decedent promised to go to the house of a neighbor residing northerly of the branch siding as soon as the Jefferson Hill train had run upon the siding out of the way. The train came in a little before 1 o'clock. After its passengers had alighted at the station, it backed up the branch line and pulled in on the branch siding, where it stopped long enough to permit the coupling of the forward end of the locomotive to a freight car loaded with ties there standing and the releasing of the car brake, and then it backed down the siding; the combination car being ahead, the locomotive next, and the freight car in the rear. No warning was

given before or as the train began to back, and there was no one upon the combination car. The decedent started from her house about 1 o'clock and walked toward the neighbor's house in the footpath. She walked from a point on the platform to the branch siding without stopping or looking to the right or left, and was there struck by the backing train and was killed. When she stepped from the platform, the train was 35 to 45 feet distant. It began to back about that time, and moved with little noise at the rate of four to six miles an hour. There was no time after the decedent left the house when she could not see the train and observe whether it was at rest or in motion. One of the defendants' rules required all trains and engines at that station to run "very carefully and under control within yard limits." Another rule required the engine bell to be rung when the engine was about to move. The defendants introduced in evidence their train dispatcher's orders relating to the movements of locomotive 807 between June 24 and August 7, 1902, during the hours of the day between 1 and 5 o'clock in the afternoon, the train sheets kept in the regular course of business showing such movements, and the record of the movements made by the conductor as they occurred. It appeared from these orders, etc., that the locomotive was engaged in service away from the Cherry Mountain station during these hours, from half an hour to an hour on 15 days, from 1 to 2 hours on 6 days, and from 2 to 3 hours on 6 days—leaving the station between 1 o'clock and 20 minutes past 1 on 13 days, between 20 minutes past 1 and 50 minutes past 1 on 6 days, and later than 2 o'clock on the other days. The defendant also produced as witnesses the trainmen of the Jefferson Hill train and the station agent at Cherry Mountain, whose testimony tended to prove the following facts: Locomotive 807 did more or less shifting of cars in the yard at Cherry Mountain. It never went on the branch siding to remain until after it had done its extra work and shifting. Whenever the combination car was set on the branch siding, a passenger car was with it. These cars were sometimes placed on this siding and sometimes on a siding south of the main line. They and the locomotive were placed and remained on the branch siding many times during the summer of 1902, both on days when the locomotive did extra work and when it did none. They were usually placed on that siding when no cars were in the way, and were backed onto it from its westerly end. The locomotive and car never backed up the branch line and pulled in on the siding from its easterly end before the day of the accident. Whether the cars and locomotive were set upon this siding during the hours of the day above mentioned so frequently that it could properly be said they were set there customarily was doubtful. As soon as the locomotive was coupled to the freight car on the day of the accident, the fireman looked back and saw the decedent standing about midway of the station

platform, facing across the Jefferson Hill branch and siding. Upon starting, he struck the bell and turned around toward the freight car to see if it was coming, and did not look back again before the decedent was struck. The engineer was on the side of the locomotive farthest from the decedent, and did not see her. The train backed 100 feet or more before striking the decedent at such rate of speed that it could have been stopped within 20 feet. It was 20 to 30 feet from the middle of the station platform to the place of collision. It appeared as if the decedent did not see the train and was not conscious of its approach. When she stepped on the siding, she turned so as to face from the train. Some portions of the defendants' other evidence conflicted more or less with the plaintiff's evidence. At the close of the testimony the defendants moved for an order directing a verdict in their favor. The motion was denied, and they excepted. They raised the same question by exceptions to be denial of their requests for similar instructions to the jury in the charge. They also excepted to the denial of their requests for other instructions, and to certain rulings relating to the testimony and examination of witnesses. These exceptions and the facts pertaining to them appear in the opinion.

Sargent, Remick & Niles, for plaintiff.
Mitchell & Foster and *Streeter & Hollis,* for defendants.

CHASE, J. The defendants, in their argument in support of the exception to the denial of their motion for an order directing a verdict in their favor, place much reliance upon the character and weight as testimony of the orders, train sheets, and records put in evidence by them, relating to the movements of the locomotive of the Jefferson Hill train. They say that this testimony demonstrates the falsity of the plaintiff's testimony relating to the customary movements and location of the train during the afternoon hours, and consequently the falsity of the proposition that the decedent was exercising ordinary care in attempting to cross the tracks as she did. In their brief they freely admit that, "if * * * the testimony of the plaintiff's witnesses were opposed merely by the testimony of the defendants' trainmen, the conflict would be for the jury to determine;" that it would then be "the common case of one set of men contradicting another, and, so far as the court could see, either might be right, and reasonable minds could conceivably differ as to which was right." In the consideration which they have given to these orders, etc., they seem to have overlooked the fact that they specifically relate to the locomotive alone. Assuming, for the purposes of the argument, that this testimony, by reason of its character, inherently and conclusively implies verity, it proves only that the locomotive moved about as shown by it. It does not prove that the combination car, alone or in connection with another car, was taken

with the locomotive while performing outside service, or that it did not customarily stand upon the branch siding during the afternoons. It does not prove that the locomotive was used in shifting cars in the yard at Cherry Mountain after its arrival there. Indeed, the testimony introduced by the defendants themselves tended to prove that the cars and the locomotive, one or all of them, so frequently stood upon this siding during portions of the afternoons that it was doubtful whether it could not properly be said that they customarily stood there. The defendants were at liberty to argue to the jury that they had shown by conclusive testimony that the plaintiff's witnesses were not entitled to credit; but the jury were not obliged to find, because the witnesses were in error as to some particulars, that they were false or in error as to all. They were at liberty to find, if upon a consideration of all the testimony such appeared to them to be the fact, that the plaintiff's witnesses were mistaken or misrecollected as to some of the movements of the locomotive, but were entitled to credit as to other matters. They might reasonably believe that there would be more or less unintentional errors in the testimony of witnesses—whether called by the one side or the other—given after the lapse of four years from the time when the transactions occurred as to which they testified. Furthermore, the question of the decedent's care did not necessarily depend upon the fact that the Jefferson Hill train, without change in its make-up, pulled onto the branch siding immediately after its passengers alighted, and stayed there during the remainder of the afternoon. If the train, with or without the additional passenger car, was frequently placed on the siding at some time during the afternoon and usually remained there after being so placed until 4 or 5 o'clock, a jury might reasonably find that the decedent, familiar with such custom, would not be wanting in due care if she assumed that the train which caused her death, having gone onto the siding, would not back out immediately. State *v.* Railroad, 52 N. H. 528. As was said in Smith *v.* Railroad, 70 N. H. 53, 85, 47 Atl. 290, 293, "familiarity with the manner in which the railroad is operated and the times when trains pass over it might excuse a traveler, under some circumstances, from looking or listening for a train when about to pass over the crossing." The plaintiff's testimony on the question of the decedent's care was certainly as full and definite as it was at the former trial, which, it has been decided, was sufficient to require the submission of the question to a jury. Minot *v.* Railroad, 73 N. H. 317, 61 Atl. 509. The defendants' testimony, while conflicting with the plaintiff's in some particulars, tended to confirm it in other particulars. There was no such certain and conclusive verity and preponderance in it as would enable one to say with confidence that reasonable and impartial men, upon considering and weighing it in connection with the plaintiff's testimony, would not differ in their judgments, but

must unanimously come to the conclusion that the decedent's death was due, in part at least, to her own want of due care. Deschenes *v.* Railroad, 69 N. H. 285, 46 Atl. 467; McGill *v.* Granite Co., 70 N. H. 125, 129, 46 Atl. 684.

The defendants cite Gahagan *v.* Railroad, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426, and urge the proposition that this case is on all fours with it. That case was taken from the jury, "because upon the evidence there is no disputed question of fact to be determined." 70 N. H. 446, 50 Atl. 149, 55 L. R. A. 426. Gahagan "walked upon a railroad crossing within a railroad yard, over which he knew trains and shifting engines were frequently passing." 70 N. H. 445, 50 Atl. 148, 55 L. R. A. 426. According to the plaintiff's evidence in this case, Mrs. Fitzgerald's knowledge as to the use of the defendants' railroad yard was that no shifting was done in it during the afternoon hours; or, in other words, the fact within her knowledge was the direct opposite of that which was within Gahagan's knowledge. This case also differs essentially from State *v.* Harrington, 69 N. H. 496, 45 Atl. 404, and Boston & Maine R. R. *v.* Sargent, 72 N. H. 455, 57 Atl. 688, cited by the defendants. In the first case there was no conflict in the testimony upon the point as to which the verdict was ordered; and, in the second case, there was an estoppel arising from a prior judgment which entitled the plaintiffs as a matter of law to a verdict upon the point as to which it was ordered. Nor does Arnold *v.* Prout, 51 N. H. 587, support the defendants' position. In that case the court, after noting that there was no evidence tending to prove that the delivery of the ale in suit was to be in this state under the contract for its sale—the point on which the verdict was ordered—said: "The counsel for the defendant are right in their position that if there was any evidence, though slight, tending to rebut the position that the delivery was in New York, the question ought to have been submitted to the jury." The defendants' exceptions to the denial of their motion for an order directing a verdict in their favor and to the denial of their request for similar instructions to the jury stand no better than their exception to the denial of their motion for a nonsuit upon the former transfer of the case, and like that exception, they must be overruled. Minot *v.* Railroad, 73 N. H. 317, 61 Atl. 509.

The defendants also excepted to the denial of their requests for certain other instructions to the jury. These requests were made in several different forms, but the following may be taken as a sample of one class of them: "Upon the undisputed evidence Mrs. Fitzgerald was familiar with the course of business at Cherry Mountain station, and she walked from the platform onto the Hill siding without taking any precautions to learn whether the train was moving. In so doing she was guilty of negligence which prevents a recovery, unless an ordinarily pru-

dent person, familiar with the course of business at that station, would have understood that there was no danger of this engine and car backing at the time she undertook to cross. A person of ordinary prudence could not so understand, unless it was the usual practice for the engine and combination car to pull onto the Hill siding at this time of day and remain there for a considerable time. Unless, therefore, you find that it was the usual practice for the engine and combination car to pull onto this particular siding when they arrived from the Hill at 12:50 and had discharged the passengers, and to remain upon this siding for a considerable time before again moving, your verdict must be for the defendant railroad." In determining the question of the dedecedent's care, an important fact to be taken into consideration was the state or character of her knowledge as to the movements of the Jefferson Hill train, etc., in the Cherry Mountain yard. Would her habitual observations of these movements naturally produce (1) the impression upon her mind that the locomotive and car of the train customarily pulled onto the branch siding immediately after its passengers had alighted and remained there until late in the afternoon; or (2) the impression that whenever in the afternoon they pulled in there they usually remained until 4 or 5 o'clock; or (3) the impression that the locomotive alone, or in connection with the car, was usually engaged for a time immediately after its arrival at the station in shifting cars about the yard, including the branch siding, and did not go upon the siding to remain, if at all, until later in the afternoon; or (4) the impression that whenever the locomotive was about to move in shifting cars or other service its bell was rung, and it moved very carefully and under control; or, summarizing these matters in a more general form, was the decedent's knowledge such as reasonably to induce a belief that the locomotive and car pulled onto the siding to remain at this particular time, or a belief that it was engaged in shifting cars or other service? If it was such as reasonably to induce the former belief, the decedent might well be regarded as in the exercise of due care in going upon the siding as she did; but, if it was such as reasonably to induce the latter belief, the jury would probably have no difficulty in finding that her conduct was wanting in the element of due care, provided they found that the bell was rung before the locomotive started. The defendants' request for instructions above quoted, besides being objectionable because it gives undue prominence to portions of the testimony and is argumentative (Spalding *v.* Brooks, 58 N. H 224; Phœnix, etc., Co. *v.* Clark, 59 N. H. 345; Fogg *v.* Moulton, 59 N. H. 499; Rublee *v.* Belmont, 62 N. H. 365; Davis *v.* Railroad, 68 N. H. 247, 252, 44 Atl. 388), is objectionable because it ignores, or, rather, decidedly diverts attention from, the proposition that if the decedent's knowledge was such as is referred to in the first or second of the alternatives

above enumerated, and the bell was not rung as the locomotive was about to start, she might reasonably be regarded as without fault. This request and the others of the same class were properly denied.

Another of the defendants' exceptions was to the denial of their request for an instruction to the jury as follows: "If you find that the course of business was such that the movements of the engine and car, at the time of day when the accident happened, were variable and uncertain, Mrs. Fitzgerald was not justified in stepping upon the track without looking to see whether they were in motion, and the plaintiff cannot recover." An instruction of this kind would be faulty, because it would divert the jury's attention from the testimony relating to the defendants' rules as to the giving of a warning when the locomotive was about to move and its control while in motion, and the probable knowledge acquired by the decedent regarding these matters from her habitual observations. Davis *v.* Railroad, 68 N. H. 247, 44 Atl. 388. The request for this instruction was also properly denied.

The request for an instruction that the decedent was a trespasser, and the plaintiff was not entitled to a verdict unless her peril was discovered by the defendants' employees in season to prevent injury to her by an exercise of ordinary care, was properly denied, for the reasons stated in the former opinion in this case. Minot *v.* Railroad, 73 N. H. 317, 321, 61 Atl. 509. One of the witnesses called by the plaintiff was allowed to testify, subject to the defendants' exception, that the 1 o'clock Jefferson Hill train for four or five years prior to the summer of 1902 was handled just the same as it was that summer. The defendants say this testimony was irrelevant and calculated to mislead the jury. It had the same relevancy to the questions on trial that the testimony had relating to the movements of the train during the summer of 1902. The uniformity of the custom for four or five years would be likely to impress the decedent, who resided near the station for some years and habitually observed the movements. It had a natural tendency to make her knowledge definite and certain. Whether the testimony should have been limited to a briefer period than four or five years was a question that was within the discretion of the court to determine, and is not open to consideration here.

The defendants' exception to the declination of the court to limit the testimony regarding the custom as to the movements of the Jefferson Hill train to the time of day immediately following its arrival at Cherry Mountain is also overruled, for the reasons above stated.

The plaintiff, upon the cross-examination of the conductor and the engineer of the Jefferson Hill train, attempted to show that certain of the defendants' rules applied to the situation as the

train backed down the siding, and required certain precautions. In doing so, he read the rules to the witnesses in the hearing of the jury, and asked questions concerning their application. The defendants excepted to this course. It was a dangerous course for the plaintiff to take, but it does not appear that it could possibly result in any harm to the defendants in this instance. As to two of the rules read, the witness testified, in substance, that they had no application to the situation of the backing train, and neither of them was offered in evidence. One of them was, in substance, the same as another rule that was put in evidence by the plaintiff and obviously applied to the situation, and the other was entirely immaterial and harmless. A third one was put in evidence without objection.

Exceptions overruled. All concurred.

SODERLUND v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota, Oct. 18, 1907.)

[113 N. W. Rep. 449.]

Master and Servant—Injury to Servant—Act of Fellow Servant—Scope of Employment.*—A crew of six or seven men, including respondent, were engaged in repairing, a railway track, and appellant provided hand cars for the purpose of going to and from their work. At the time of the accident the other members of the crew propelled the car at such a high rate of speed that respondent lost his hold on the handle bars and fell from the car. There was no necessity for running the car so rapidly, and it was done thoughtlessly, in the spirit of fun, and for their own amusement, although respondent had asked them not to go so fast. Held, that in thus negligently overspeeding the car the men were engaged in the performance of their duty to the master, and were not acting without the scope of their authority. The evidence is sufficient to sustain the verdict. (Syllabus by the Court.)

Appeal from District Court, Goodhue County; Andrew Holt, Judge.

Action by Ole Soderlund for personal injuries against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. W. Root and *Frank M. Wilson*, for appellant.
Johnson, Mohn & Mohn, for respondent.

LEWIS, J. Appellant company was engaged in repairing its main track of railway between Lake City and a point about three

*See preceding case, and foot-notes.

miles distant. From 16 to 18 men were engaged in this work under the charge of a foreman. The men boarded at Lake City, and hand cars were provided by the company for their use in going to and from the work. Respondent was 69 years old, had been in appellant's employ for the period of 16 years, was familiar with the method of repairing railroad tracks, and had had large experience in riding upon and in propelling hand cars. At the time of the accident the crew of men engaged in repairing the track left Lake City on hand cars for the purpose of returning to their work. The foreman and a part of the crew were riding on the first car, and respondent, with five or six other men, were riding on the second car. Respondent and one other man stood on the front end of the car with their backs to the front of it, three of the men stood on the rear end of the car facing the direction in which they were going, and the other two men stood on either side of the handle bars. The usual speed taken in making the distance was at about the rate of 16 miles an hour. The crew on the second car having dropped some distance behind the first car, some one on it suggested they should hurry, and so they began to pump faster and gradually increased the speed. What then occurred was described by respondent as follows: "Then the boys on my car began to pump as much as they could, and the car was running so that the dust was flying around us and I couldn't follow up with the pumping. I had to change hands, and I hollered to them that they mustn't pump so fast, and then they only laughed at me, and pumped the harder, and ran the hand car so fast that I couldn't stand it, and in the act of changing hands I fell off backwards, and struck on my head and arm, and the car passed over me. I became unconscious, and the next thing I remember I was in my house and the doctor was there." Respondent recovered a verdict in the court below upon the ground that the hand car was operated by respondent's co-employees at such an excessive and dangerous rate of speed as to cause respondent to lose his balance and fall from the car.

Upon this question the evidence is sufficient to support the verdict. The other members of the crew, being young and vigorous men, were able to propel the car at great speed and still retain their hold on the handle bars. Knowing respondent's age, and having been warned by him that they were going too fast for him, and knowing it was difficult for him to change his position while the car was progressing at such a high rate of speed, they conducted themselves in a reckless manner, to say the least, with respect to the safety of their associate in speeding the car "just for fun." We do not consider that the crew in charge of the hand car were acting without the scope of their authority for purposes of their own, and not in the interest of the master. While the customary rate of speed was 15 or 16 miles an hour,

and they were not required to propel the car at any greater rate in the interest of the master's employment, and they attained the high rate of speed on this occasion from motives of pure thoughtlessness, merely for the purpose of "having a little fun with the old gentleman," yet they were engaged in propelling the car furnished for the purpose of conveying them to and from their place of work. The distinction between this case and that of Kincade *v.* C., M. & St. P. Ry. Co., 107 Iowa, 682, 78 N. W. 698, is apparent. In that case the act of the co-employee in striking the plaintiff's partner was wholly outside of, and not in pursuance of the performance of, any duty of the master. Here, however, the co-servants are charged with negligently performing the very act which it was their duty to perform, viz., propel the car, and that in overspeeding it they negligently conducted the master's business. Crandall *v.* Boutell, 95 Minn. 114, 103 N. W. 890; Merril *v.* Coates (Minn.) 111 N. W. 836; Thompson on Negligence, vol. 11, § 1910; Euting *v.* C. & N. W. Ry. Co., 116 Wis. 13, 92 N. W. 358, 60 L. R. A. 158, 96 Am. St. Rep. 936; Cohen *v.* Dry Dock, East Broadway & Battery Co., 69 N. Y. 170.

Affirmed.

DRAWDY *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Oct. 12, 1907.)

[58 S. E. Rep. 980.]

Railroads—Accidents at Crossings—Violation of Signal Statute.—Where a railroad fails to comply with the signal statute when approaching a crossing, and a person is killed there by the train, the noncompliance is presumed to be the negligence which caused the death, unless it is shown to have been caused in some other manner.

Same—Contributory Negligence—Nonsuit.*—A person who knew that a train was approaching a crossing, and had ample opportunity to observe its proximity, speed, and the extreme hardihood of attempting to cross in front of it, nevertheless made the attempt and was killed. Held, that he was guilty of contributory negligence warranting a nonsuit.

Appeal from Common Pleas Circuit Court of Colleton County; R. O. Purdy, Judge.

Action by W. P. Drawdy, executor of M. A. Drawdy, against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

See 55 S. E. 444.

*See preceding case, and foot-notes.

Griffin & Padgett, Howell & Gruber, and *C. C. Tracy,* for appellant.

W. Huger Fitzsimons, T. M. Mordacai, Peurifoy Bros., and *P. A. Wilcox,* for respondent.

WOODS, J. M. A. Drawdy was killed by defendant's train while attempting to cross its track at Green Pond, where the public road intersects the railroad; and the plaintiff, as administrator, brought this action to recover damages for his death. The judgment of the circuit court overruling a demurrer to the complaint was affirmed by this court. 75 S. C. 308, 55 S. E. 444. The former appeal decided it was not per se such negligence as will prevent a recovery for personal injuries or death for one to undertake to cross a railroad track at a crossing after he has heard one blast of the whistle of the approaching train. The particulars of the accident as they appeared in the complaint were held not to show on their face gross or willful negligence preventing a recovery under the statute which makes a railroad company liable when it fails to give the statutory signals, unless the person killed or injured was guilty of willful or gross negligence. When the case came on for trial, the circuit judge held the particulars of the accident developed by the evidence on behalf of the plaintiff to show plainly the gross negligence of Drawdy in attempting to cross the track in front of the train contributed to his death as a proximate cause, and granted an order of nonsuit. The appeal is from this order.

The deceased, M. A. Drawdy, and his wife, Elizabeth Drawdy, on their journey from Walterboro to Beaufort, had to stop off and change cars at Green Pond. They had left home without breakfast, and, while waiting for their train, Drawdy left his wife in the station, and went across the track for the purpose of buying lunch at a store nearby. On his return, he was struck and killed by a through train not scheduled to stop at Green Pond. There was evidence that the train was running at a high rate of speed, but not faster than the fast trains usually ran by; and that there was an embankment which for a part of the way would obstruct Drawdy's view of the approaching train on his return; and some of the witnesses testified they heard one sharp blast of the whistle at the usual place about 500 yards distant, but did not hear the continued signal required by the statute. The statute provides that, if the continued signal prescribed is not given, "the corporation shall be liable for all damages caused by the collision, * * * unless it be shown that in addition to mere want of ordinary care, the person injured or the person having charge of his person or property was at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury." The court held in Strother *v.* Railroad Co., 47 S. C. 381, 25 S. E. 273: "The failure on the

Part of defendant's servants to ring the bell or sound the whistle in the manner provided by the statute was negligence per se. When the defendant violates the requirements of the statute as to ringing the bell or sounding the whistle, and a person is injured by its locomotive while crossing a highway, street, or traveled place, it will be presumed that such negligence caused the injury, unless the testimony shows that the injury was caused in some other manner, which was not done in this case." There was evidence that the crossing at Green Pond was a much frequented and traveled place and plaintiff contended on the authority of Risinger *v.* So. Ry. Co., 59 S. C. 429, 38 S. E. 1, that it was for the jury to decide whether the rate of speed at which the train was run by such crossing was negligence. The remarks in the Risinger Case were applied to the rate of speed through the town or Leesville, and we do not think there is good ground to extend the principle to an ordinary crossing merely because it is frequented, for the reason that as to mere crossings the statute has prescribed the precautions to be taken.

But the point is not material here, for under the case of Strother *v.* Ry. Co., *supra,* noncompliance with the signal statute is presumed to be the negligence which caused personal injury or death of a person injured or killed by the train at a crossing. As there was some evidence from which it might possibly be inferred that the continued signal prescribed by law was not given, the consideration of the appeal from the nonsuit must begin with the assumption that the negligence of the defendant was a proximate cause of the death of Drawdy. The inquiry, then, is whether there was gross negligence on the part of Drawdy contributing to his death as a proximate cause. We think that no other than an affirmative answer is possible under the evidence offered by the plaintiff. Drawdy went across the track to the store of either Welch or Boynton. Those stores were opposite each other on the public road, not more than 30 feet from the track. G. S. Arnett, the only eyewitness of the accident, testified to these facts: He was standing between Boynton's store and the railroad, 15 or 20 feet from the track. Drawdy passed him, going towards Welch's store. A few minutes afterwards the witness heard a sharp blast from the approaching train at about 500 yards distant. It does not appear that he knew where Drawdy was at this moment. After a lapse of 10 or 15 minutes from the time he crossed the track, and after the blast of the whistle, Drady passed the witness at a run in the effort to recross the track in advance of the train. From his position when Drawdy passed him the witness saw and heard the train, and knew the impossibility of making a safe crossing. It is manifest from the evidence that Drawdy had heard the signal, knew the train was approaching, and was running a race with it in his anxiety to get to the station.

Had he taken the slightest precaution to use his eyes or ears, he could not have failed to see how near the train was, how rapidly it was running, and how reckless would be the attempt to cross in front of it; for he passed the very spot where all these things were obvious to Arnett. It seems the train was so near when he passed Arnett that he was not able to go 10 steps to the railroad before the locomotive came, for the position of the body indicated he did not have time to get in front of the train. This is Arnett's account in his own language: "Q. You say Mr. Drawdy was running towards the railroad? A. Yes, sir. Q. How far was he from the railroad when he passed you? A. At whatever distance I was, I would say 20 to 25 feet. Q. Eight or ten steps? A. Yes, sir; it was 10 steps. I am sure it was that far. Q. What happened after that? Just describe it in your own way. A. Well, he tried to apparently—As he passed by me in such a rush, I looked around, and seen he was trying to get across the railroad, and the train was so near at hand I watched him, and seen there was going to be a collision; that he could not get across, and closed my eyes for a moment to keep from seeing him, and, as quick as the engine passed, I opened them and stooped down, and look underneath the cars to see if I could see his feet on the other side, to see if he had got across, and I could not see it, and as quick as the train passed I rushed to the track and looked up it to see if I could see him, and I did see him by the track." On the cross-examination he testified: "Q. While you were standing there you heard a train blow, didn't you? A. Yes, sir. Q. You knew a train was coming, didn't you? A. I was expecting it. Q. You heard it and knew it was coming? A. Yes, sir. Q. Mr. Dradwy at that time was on the south side of you? A. Yes, sir; he passed me. Q. So, when he got to you, if he had any hearing at all, he must have known the train was coming? A. Well, I think so. * * * Q. Tell me why it was that you shut your eyes when you saw him going to that train? A. To keep from seeing a position. Q. Why was it? A. I saw the speed he was going, and the speed the train was going. Q. You knew it was impossible for him to cross first? A. Yes, sir. Q. Are you sure Mr. Drawdy got on the track? A. Yes, sir. Q. Didn't you shut your eyes? A. I don't know whether he got on the track or not. I seen the way he was going, and that he was going to try to get across. Q. Didn't you see he couldn't get on the track in front of that engine? A. I didn't know whether he was going on or not. I seen there was going to be a collision."

In Bamberg *v.* Railroad Co., 72 S. C. 393, 51 S. E. 989, "the plaintiff testified she had already crossed the track 30 or 40 yards from the place where she was injured; and there looked for the train, but did not see it, walked rapidly on, and, hearing no whistle or bell, undertook to cross a second time without looking again.

Under this proof, it was for the jury to say whether the plaintiff's failure to look and listen constituted contributory negligence." But in that case the court says: "No doubt the failure to look and listen before going on the railroad track under some circumstances would be held to admit of no other inference than that the person injured was guilty of contributory negligence, and in such cases the court would grant a nonsuit on the principle announced in Jarrell *v.* Railway Co., 58 S. C. 491, 36 S. E. 910. This case is clearly of that character. Its facts are not even analogous to those in the Bamberg Case, and are very different from those in Osteen *v.* Railroad Co., 76 S. C. 368, 57 S. E. 196, where the verdict was allowed to stand only because of a doubt as to whether the plaintiff's negligence was a proximate cause of the injury. Here Drawdy knew the train was approaching, and very near the crossing. He had ample opportunity to observe how near it was, and its speed, and, if he had observed it at all, he would have seen the extreme hardihood of attempting to cross in front of it. The fact made out a case of gross negligence by the deceased as the proximate cause of the accident at least as strong as was made in Barber *v.* Railroad Co., 34 S. C. 451, 13 S. E. 630, where the plaintiff was nonsuited because he undertook to cross in front of a train which he knew to be approaching and near at hand. The continued statutory signal could not have given Drawdy more complete warning than he had; and therefore it was not the failure to give the signal, but the neglect of the deceased to heed the notice he had of the near approach of the train, that was the proximate cause of his death. The case is an illustration of that mysterious mental condition into which men sometimes fall, where the facts present to the senses the most urgent alarm of danger, and yet the mind either fails to receive the impression, or from confusion loses control of itself and of the body.

The judgment of this court is that the judgment of the circuit court be affirmed.

RADER'S ADM'X *v.* LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, Oct. 16, 1907.)

[104 S. W. Rep. 774.]

Railroads—Actions for Injuries on Tracks—Negligence—Questions for Jury.—In an action against a railway company for the negligent killing of plaintiff's intestate while on defendant's track, evidence considered, and held sufficient to go to the jury.

Same—Operation—Care Required as to Trespassers.*—Failure of those in charge of a train to give warning of a railroad train passing through a city or town or approaching a crossing is negligence of the greatest degree, and such failure will render the company liable for injury caused, even to a trespasser.

Same.*—A railroad company is liable for an injury due to a trespasser, as well as to a person lawfully upon its track, if his peril was, or by the exercise of that character and degree of care required in operating railroad trains might have been, discovered in time to prevent or avoid injury to him.

Same—Actions for Injuries—Negligence—Questions for Jury.*—Where a railroad company has knowledge of a trespasser or licensee on its tracks or notice of their expected and probable presence, the rate of speed may be negligent as to them, and whether it is negligence is a question for the jury.

Appeal from Circuit Court, Laurel County.
"To be officially reported."

Action by Rachael Rader's administratrix against the Louisville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. E. Begley and *R. A. Dyche,* for appellant.
Benjamin D. Warfield and *J. W. Alcorn,* for appellee.

NUNN, J. This is an appeal from a judgment of the Laurel circuit court in which appellant sought to recover damages of appellee for the negligent destruction of her intestate's, Rachael Rader's, life. When appellant closed her evidence, appellee moved for a peremptory instruction, which was overruled. However, at the close of all the testimony, appellee renewed its motion for a peremptory instruction, and the court sustained the motion and gave the instruction, to which appellant objected and excepted.

Therefore the only question is: Was there any, a scintilla, of testimony supporting appellant's cause of action? This necessi-

*See extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

tates the consideration of the evidence introduced. Rachael Rader, deceased, was 12 years and 11 months of age at the time she was killed. She lived in the town of Pittsburg, Ky., nearly one-half mile from the station. The population of the town was at the time about 1,000 or 1,200. The town was located in the main, so that the business and dwelling houses faced and were on each side of the railroad track; there being a roadway on each side. The track was so constructed through the city that in some places it was elevated a few feet above the level of the dirt roads. There was only one street, or public road, over which vehicles could cross the track, and that was near to and south of the station. The railroad passes through the town in a northern and southern course; and more than one-half is within the town limits. This little girl, on the afternoon of January 3, 1903, was sent by her mother to the Pittsburg Company's store, which is situated on the west side of the railroad, and several hundred feet south of the station and this crossing for vehicles, and to the post office. She obtained the article, tobacco, from the store which she was sent for, and started to the post office, which is situated near the station and on the east side of the railroad. She came out of the store, passed between some piles of lumber, which were stacked near or in front of the store, and then moved along a path leading in the direction of the post office. She was going in a northwestern course, which placed her right side or back nearest to the train which was coming from the south. She was walking slowly, and appeared to be trying to raise an old umbrella. According to appellant's proof, it was raining or sleeting at the time. She crossed appellee's passing track, and walked a few steps along the main track, stopped and placed one foot upon the end of a tie, and made another effort to raise the umbrella, when the crossbeam of the engine struck her on the right side of the head, and killed her. All the testimony tends to show that she was from the time she left the store apparently unconscious of the approach of the train. The fireman testified that he saw her from the time she came from behind the piles of lumber until she was killed, but did not believe she would go upon or near the track. When he first saw her, he was about a quarter of a mile away, and the engineer and fireman both testified that the whistle was blown for the station and semaphor about that distance from the station, and the bell was rung continuously until the girl was killed. Appellant's testimony agrees with appellee's with reference to the blowing of the whistle, but contradicts it with reference to the ringing of the bell. The engineer testified that he had run a train through the town of Pittsburg for nearly 18 years, and that "he was always looking out for people on the track. There are always a lot of people there. It is a mining town, and we always keep a sharp lookout for them."

The evidence conduces to show that persons repeatedly crossed back and forth over this railroad track during the day with the knowledge of the servants of appellee in charge of its train. It also appears that this train was being run at the rate of 25 or 30 miles an hour, and consisted of 26 heavily loaded cars, excluding the engine, tender, and caboose, and those in charge were not able to stop it until it ran the full length of the train and three or four car lengths in addition. With this evidence before the jury, in our opinion, the court erred in giving the peremptory instruction. The evidence conduced to prove that appellant's servants were negligent in failing to ring the bell as they approached the deceased; at least, there was conflict of proof on this point, and they were moving the train at a negligent and dangerous rate of speed through the town.

In the case of East Tennessee Coal Co. v. Harshaw, 29 S. W. 289, 16 Ky. Law Rep. 526, the court said: "The evidence shows the engineer of that coal train did not signal its approach to the crossing by either whistle or bell; and that the railroad was for about 200 yards beyond straight enough to enable the engineer to see a person at or near that point. The failure of those in charge to give warning of a railroad train passing through a city or town, or approaching a crossing of a street or public road, has been held by this court negligence of the greatest degree, and will render the company owing it liable for injury caused by such failure, even to a trespasser. It is also well settled that such company is liable for injury done as well to a trespasser as to a person lawfully upon its track, if his peril was, or by exercise of that character and degree of care required in operating railroad trains might have been, discovered in time to prevent or avoid injury to him." In the case of Illinois Cent. R. R. Co. v. Murphy's Adm'r, 97 S. W. 729, 30 Ky. Law Rep. 93, the court said: "If the railroad company knows that the public habitually uses its tracks and right of way in a populous communtiy as a foot passway, so that it knows that at any moment people may be expected to be found thereon, such knowledge is treated as equivalent to seeing them there, and their presence must be taken into consideration by the train operatives in the movement of their trains. Such foot passengers may be in law only trespassers or licenses—they may, indeed, have no legal right to be there or to use the track—but the question comes back: If they are there and known to be there, what then is the company's duty as to running its trains? It is admitted that the company has the superior right—nay, maybe has the exclusive right—to the track, and that some way ought to be provided for keeping trespassers off them altogether. But the fact remains the tracks are open, inviting for easy travel, are traveled constantly, and so known to be by the company. The difference between the cases in the

country and those in thickly settled towns and cities is one practical materiality. In the country there are occasional sporadic uses of the tracks by foot passengers. But they are comparatively rare. To compel the railroad trains to creep along under full control in anticipation of what probably would not occur, viz., the meeting of overtaking of a stray trespasser, would not be reasonable, because most likely wholly unnecessary. But in populous communities the probabilities are all the other way. The foot passengers from long habit are known to and suffered by the company, may reasonably be expected at all times, and in any number. It is more than a mere probability—it is a reasonable certainty that they will be found there. The company should no more shut its eyes to such a probability within its knowledge than to the actual fact of the presence when known. We will not say that to dash at uncontrollable speed through such a town, where people are known to be using the tracks for passing, is not negligence. Let the jury say whether it is. The trial court did not submit this phase of the case to the jury. On the contrary, it was assumed that the company had the right to run its trains at that point at any rate of speed it desired, but that it must keep a lookout for trespassers, and if those in charge of the train saw, or by exercise of ordinary care could have seen, decedent in time to have avoided injuring him, it was their duty to do so. There are cases which hold that the rate of speed in towns may or may not be negligent without respect to an ordinance. And it is held that where trespassers are on the railroad track, their presence being unknown, the rule of speed is never negligent as to them, because no duty whatever was then owed to them by the railroad company. But we think the correlative principle must apply that, where there is knowledge of the presence of trespassers or licensees, or, what is equivalent, notice of their expected and probable presence, the rate of speed may be negligent as to them, because there is then a duty to them, viz., to look out for them, and take care not to run over or injure them." See, also, the case of I. C. R. R. Co. *v.* Wilson, 63 S. W. 608, 23 Ky. Law Rep. 684.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

STATE *v.* CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, June 20, 1907.)

[112 N. W. Rep. 515.]

Licenses—Distinguished from Tax—Railroads—Gross Earnings Tax.—The obligation imposed on railroads by Rev. St. 1898, §§ 1211-1213, imposing on railroads annual license fees based on their gross earnings, is imposed by the state under its taxing power.

Taxation—Railroads—Gross Earnings Tax—Maturity of Obligation—Enforcement.—The obligation imposed on railroads by Rev. St. 1898, §§ 1211-1213, imposing annual license fees on railroads based on their gross earnings and requiring each railroad to make, on or before a specified date, a true statement of its gross earnings for the preceding year, etc., becomes due at the time the statute designates, and is discharged only by payment, and on default is enforceable by the state, the right of action to each annual payment accruing when the default occurs.

Same—Actions—Complaint.—A complaint in an action by the state against a railroad for license fees imposed by Rev. St. 1898, § 1213, imposing annual license fees on railroads based on their gross earnings, which alleges that the railroad did not make true statements of its gross earnings for specified years, and that there is due the state gross license fees for the specified years, states a cause of action for such parts of the annual fees as remain unpaid for the years specified, though it fails to state as a separate cause of action a claim for each year as contemplated by section 2646, prescribing what a complaint shall contain, which defect is one of form only and cannot be considered on demurrer, but only by motion to make the same more definite and certain.

Same—Pleading—Accounting.—A complaint in an action by the state against a railroad for license fees imposed by Rev. St. 1898, § 1213, imposing annual license fees on railroads based on their gross earnings, which alleges that the state seeks to recover whatever sums remain unpaid of the annual license fees due it on the gross earnings, and charges that the gross earnings can only be ascertained by an examination of complicated and long accounts, that the state is possessed of no knowledge as to such accounts and the amounts due, and that the railroad was required to keep such accounts and to make discovery to the state, etc., states facts sufficient to constitute a cause of action in equity for an accounting.

Limitation of Actions—Limitations Applicable—Taxation—Railroads—License Fees—Actions.—An action for license fees imposed on railroads by Rev. St. 1898, § 1213, imposing an annual license fee on railroads based on their gross earnings, is an action on a claim created by statute within sections 4222, 4229, limiting the commence-

ment of actions on liabilities created by statute to six years, and declaring that limitations prescribed shall apply to actions brought in the name of the state for its benefit.

Same.—The state in an action against a railroad for license fees imposed by Rev. St. 1898, § 1213, imposing on railroads annual license fees based on their gross earnings, admitted that the railroad had made payments under the statute, and only claimed that it fraudulently omitted to render accurate reports of its annual gross earnings. The state did not show that it had not full opportunity to make an investigation and ascertain whether the reports were accurate. The state railroad commissioner was called on to examine such reports in respect to their sufficiency. Held, that the state was not misled as to its rights to enforce its demands, and the railroad was not prevented from interposing the statute of limitations on the ground of fraudulent concealment.

Same.—An action by the state against a railroad for license fees imposed by Rev. St. 1898, § 1213, imposing annual license fees on railroads based on their gross earnings, grounded on the fact that the railroad had made false reports to the state of its gross earnings, is not within section 4222, subd. 7, limiting the commencement of actions for fraud, and limitations began to run against the cause of action from the time the right of action accrued which was at the time the annual license fees were due each year.

Constitutional Law—Deprivation of Property.—Laws 1905, c. 1, amending Rev. St. 1898, § 4229, by declaring that an action in favor of the state, whether created by statute or otherwise, shall be commenced within 10 years after the cause of action therefor has accrued, while the section as it originally stood declared that the limitations prescribed for the commencement of actions shall apply to actions in the name of the state is invalid so far as it authorizes an action against a railroad for unpaid annual license fees, which by reason of the expiration of six years were barred, since the act was a deprivation of property.

Taxation—Railroads—Annual License Fees—Actions—Statutes.—Laws 1905, p. 502, c. 328, § 3, providing a remedy for the discovery of license fees due the state from railroad companies and the collection thereof, and requiring a railroad to set forth in its answer a complete discovery under oath and an accurate account of all moneys received by it in the operation of its railroad for each of the years next preceding the year as to which it is claimed that license fees or any part thereof remain unpaid, etc., though imposing an obligation on railroads in actions under the act not imposed on defendants in other suits, since the statute seeks to accomplish what has been done by bill of discovery abrogated in the state by Rev. St. 1899, § 4096, is valid as a regulation of the procedure, for collecting taxes, and is incident to the exercise of the taxing power.

Constitutional Law—Equal Protection of the Laws—Class Legisla-

tion.*—The statute is not objectionable on the ground that it discriminates between members of a class though it is applicable to railroads only, since for the purpose of taxation railroads constitute a separate class, and all railroads are treated alike.

Appeal from Circuit Court, Dane County; Warren D. Tarrant, Judge.

Action by the state against the Chicago & Northwestern Railway Company. From an order overruling a demurrer to the complaint, defendant appeals. Reversed and remanded, with directions.

See 108 N. W. 557, 594.

This action is brought by the state of Wisconsin for an accounting, and a discovery of license fees due it from the defendant railway company. The plaintiff, by the Attorney General of the state of Wisconsin, by appropriate averments in its complaint, alleges the following facts: The defendant is a railroad company incorporated under the law of this state, and as such corporation has ever since and including the year 1884 continuously to the commencement of this action been engaged in operating various lines of railroad in this state, and has been and now is so engaged in the business of a common carrier of freight and passengers. The defendant owns real estate and personal property situate in this state of great value, which has since and before the year 1884 been by law exempt from taxation. The defendant was, however, required by law to pay 4 per centum of its gross earnings as a licence fee, in lieu of paying taxes on its property and in consideration of being granted the privilege of doing a railroad business in this state. This license fee was to be paid, one-half at the time the license for each year issued, and one-half on or before the 10th day of August in each year. It is alleged on information and belief that defendant's gross earnings, since and including the year 1883, have exceeded $3,000 per annum per mile of operated railroad in the state. The defendant is alleged to be charged with the duty of making and returning to the Treasurer of the state of Wisconsin, on or before the 10th day of February of each year, a true statement of its gross earnings for the preceding calendar year, this statement to contain a correct statement of the number of miles of railroad it operated, and the gross earnings per mile per annum for the preceding year, as a condition precedent to the right to a license from the state authorizing operation of its railroads within this state, and exempting its property from taxation for each year, beginning January 1st and ending December 31st. The complaint alleges,

*For the authorities in this series on the subject of uniformity and equality in taxation, see Cumberland, T. & T. Co. v. Hopkins (Ky.), 18 R. R. R. 673, 41 Am. & Eng. R. Cas., N. S., 673.

on information and belief, "that defendant has not made and returned to the State Treasurer a true statement of its gross earnings for the preceding calendar year in any year from and including the year 1884 to and including the year 1903, and has failed and neglected each and every of said years to make and return to the State Treasurer such true statement as it is required to do by law, but has failed and neglected in that behalf each and every of said years; that defendant has made and returned to the State Treasurer certain so-called written statements each of the years above mentioned, contained in each of which statements was a pretended statement of the true amount of its gross earnings for the year preceding each and every of the years above mentioned." The complaint alleges that the statements made were falsely represented to be a complete, full, and correct statement of gross earnings, and that the railroad paid the 4 per centum license fee thereon, and thus paid much less annually for the years from 1884 to 1903, both inclusive, than it should have paid as such license fees. The complaint sets forth that the statements were actually made by the defendant for each of such years, states the reported gross amount of earnings of the railroad, and the four per centum of the same, and then alleges, "on information and belief, that each and every statement so made and returned by defendant as above set forth, purporting to give the amount of defendant's gross earnings, was falsely and fraudulently made, and was, and is, untrue and incorrect, as defendant well knew at the time each such statement was made, and was not a true statement of the gross earnings of defendant for the preceding year; that in fact and in truth, as defendant well knew, the gross earnings of defendant were much more than the amounts represented by defendant in said statements for each of such years; that each and all of said statements were made and returned by defendant with the intention of defrauding plaintiff out of large sums of money due plaintiff from defendant as license fees, and were made and returned by defendant for the purpose of fraudulently obtaining its license for each year of said years between 1884 and 1903, both inclusive"; that, by reason of such false and fraudulent statements, defendant has defrauded the state out of large sums of money, and that the state, relying on such statements, caused licenses to be issued to defendant to operate its railroads in this state. It is alleged that defendant has failed and neglected to keep its books of account within the state and accessible to the state officers charged with the duty of ascertaining therefrom the actual facts respecting the railroad's gross earnings. It is stated that plaintiff, without fault or neglect on its part, did not know the alleged false and fraudulent character of the statements so made by defendant respecting its annual gross earnings; that defendant now refuses to pay the amounts actually due the state as such license fees for each of

these years; that defendant is indebted to plaintiff for such amounts; and that the licenses to operate its railroad in the state were fraudulently obtained, and are void. "Plaintiff further alleges that it cannot state the true amounts of gross earnings of the defendant company for the years hereinbefore mentioned, or any of them, and of the sum of money fraudulently as aforesaid withheld by and due from the defendant for license fees for said years; that the knowledge and information relating thereto is solely within the possession of the defendant, and that the records, books, vouchers, and papers showing and relating to said gross earnings are solely within the possession and under the control of the defendant and are without the state of Wisconsin. * * * Plaintiff still further alleges, on information and belief, that in order to determine the true amount of the gross earnings of the defendant for the year preceding each and every year from and including the year 1884 to and including the year 1903, and the amount of license fees on such gross earnings which it owes and ought to have paid the state for said licenses and each thereof hereinbefore mentioned, it will be necessary that the defendant account to the plaintiff for the true amount of all such gross earnings for each preceding year as aforesaid during each and every of the years from and including the year 1884 to and including the year 1903, that such accounting would require examination and inspection of hundreds of thousands of items extending over the period of at least 20 years, and it will be further necessary, in order that plaintiff may obtain relief in the premises, that plaintiff may have a discovery of and from defendant under oath, relating to the above facts." The plaintiff demands judgment, whereby defendant shall be required to make and render a true and correct account and to make full and true discovery of all its gross earnings for the years specified in the complaint; that plaintiff have judgment for such amount as may be found due the state over and above the amounts actually paid on account of such license fees, that the licenses heretofore obtained be adjudged to have been fraudulently procured and to be void and that they be ordered canceled, and that plaintiff recover its costs and disbursements of the action and have such other relief as may be found just and equitable.

The defendant demurred to the complaint upon the following grounds: (1) That the court has no jurisdiction of the subject of the action; defendant averring that chapter 328, p. 501, Laws 1905, is violative of section 1, art. 14, of the Constitution of the United States, in that it deprives defendant of its property without due process of law and denies it the equal protection of the law. (2) That several causes of action are improperly united. (3) That the complaint does not state facts sufficient to constitute a cause of action; defendant averring specifically that the demands for license fees are invalid because the statutes attempt-

ing to impose the license fees violate section 8, art. 1, Constitution of United States, and because chapter 328, p. 501, Laws 1905, is void, as alleged under the first ground of demurrer. (4) That the action was not commenced within the time limited by law; defendant relying on and referring to subdivisions 3, 4, § 4222, St. 1898, and also referring to and relying on subdivision 1, § 4224, St. 1898. Defendant demurs separately to the alleged cause of action against it for the first installment of unpaid license fees for the year 1899, relying on and referring to the statutes of limitation above specified. The court overruled the demurrer.

This is an appeal from the order overruling the demurrer.

Edward M. Hyzer and *Lloyd W. Bowers*, for appellant.

F. L. Gilbert, Atty. Gen., and *A. C. Titus, Asst. Atty. Gen.* (*L. M. Sturdevant*, of counsel), for the State.

SIEBECKER, J. (after stating the facts). Upon the facts alleged, the state asserts the right to recover whatever portion of the license fees imposed by section 1213, St. 1898, remains unpaid for any of the years embraced in the complaint. In view of the conflicting claims of the parties as to the nature of this obligation, it seems essential to some of the questions presented on this appeal to first determine the nature of the obligation upon which the state claims the right to recover against the defendants. This court has so recently considered the question in an extended examination that further elaboration is not required.

In the case of State *v.* Railway Cos., 128 Wis. 449, 108 N. W. 594, the nature of the obligation so imposed on railway companies was exhaustively treated and was held to be an exaction imposed by the state under the taxing power. In its inception the state proceeds in the usual manner of imposing it as a burden on a privilege and franchise, which the defendant was required to assume as a condition precedent to exercising the privilege thereby granted. It was said that these incidents to its imposition gave rise to features of a contractual nature, but it was declared that the obligation itself was clearly a tax imposed by the state under its taxing power for the purpose of raising revenue to meet expenses in administering the governmental affairs. This view was also followed in the case of Nunnemacher *v.* State (Wis.) 108 N. W. 627, decided at the same time. The grounds for this conclusion were so exhaustively presented in these two cases as to leave nothing to be added, and further discussion at this time can serve no useful purpose. We shall treat the question as at rest, and assume for the purposes of this case that the state seeks to collect unpaid taxes due it from the defendant for the various years covered by the complaint.

The plaintiff insists that the facts stated constitute but one

ing of the concurrent jurisdiction in law and equity over causes, says: "The most important, comprehensive, and multiform remedy of the concurrent jurisdiction which results in pecuniary recoveries is that of accounting. The variety of its uses and possible application is practically unlimited. It can be adapted to all circumstances and relations in which an account is necessary for the settlement of claims and liabilities, and for the doing full justice to the litigant parties." 1 Pomeroy's Equity Jurisprudence, § 186. Besides plaintiff's right to a discovery incident to the transactions involved, it is obvious that, by reason of the complexity and length of the accounts, the remedy in equity is more appropriate, adequate, and complete than that in law. These considerations furnish a sufficient and substantial basis for the exercise of the equitable jurisdiction of the court upon the facts alleged in the complaint. 1 Pomeroy's Equity Jurisprudence, §§ 139, 140, 223, 225. The case of Schwickerath *v.* Lohen, 48 Wis. 599, 4 N. W. 805, followed this rule and declared: "Whether the accounts between the parties are mutual or not, where a discovery is a necessary part of the accounting, as in this case, the jurisdiction of a court of equity is unquestionable." See, also, North Side, Loan & Bldg. Soc. *v.* Nakielske, 127 Wis. 539, 106 N. W. 1097; Lessel *v.* Zillmer, 105 Wis. 334, 81 N. W. 403; Chaffee *v.* Conway, 125 Wis. 77, 103 N. W. 269; Somervaill *v.* McDermott, 116 Wis. 504, 93 N. W. 553; 6 Pomeroy's Equity Jurisprudence, § 930; 16 Cyc. ("Equity," 4a) p. 41; 1 Cyc. (d and e) pp. 420, 421. We deem the action properly within the equitable jurisdiction of the court, and find that the complaint alleges facts sufficient to constitute causes of action in equity for an accounting. The defendant having demurred to each cause of action in the complaint, upon the ground that this action was not commenced within the time limited by law. This presents the inquiry: Are any causes of action alleged in the complaint barred by the statutes of limitation?

By subdivisions 3, 4, § 4222, St. 1898, it is provided that actions must be brought within six years after the cause of action accrued, when the cause of action arises: "(3) * * * upon any other contract, obligation or liability, express or implied, except those mentioned in the last two preceding sections. (4) * * * upon a liability created by statute, other than a penalty or forfeiture, when a different limitation is not prescribed by law." Section 4229, prior to its amendment by chapter 1, p. 3, Laws 1905, enacted that "the limitations prescribed in this chapter shall apply to actions brought in the name of the state or for its benefit in the same manner as to actions by private parties," excepting rights by adverse possession, etc., of real property. Chapter 1, p. 3, Laws 1905, amends this section, and prescribes that an action accruing to the state to recover a penalty or forfeiture, and actions for forfeitures begun under section 1214, St.

1898, must be commenced within six years after the cause of action accrued, and "any other action in favor of the state, whether created by statute or otherwise, must be commenced within ten years after the cause of action therefor has accrued." The language of the statute prescribing that the periods of limitation for bringing action after the cause of action has accrued shall apply to the state is plain in its meaning and clear in its terms. There is no question but that in its ordinary signification it is made to apply in the same manner as between private parties. This court has on former occasions considered the statute and so construed the legislative purpose. In Coleman *v.* Peshtigo Co., 47 Wis. 180, 2 N. W. 111, an action to recover damages for trespasses upon land while it belonged to the state was brought by the patentee, who claimed to have succeeded to the rights of the state to maintain the action. It was there contended that the statute did not run against this demand while the state owned the land, but the court held in construing the limitation statutes that "the language * * * is so explicit that it is difficult to comprehension how the exception contended for by counsel (that it did not include such demands in favor of the state) could have been intended by the Legislature, * * * or could be made to exist by any construction of the language used, however technical or strict." In the case of Scheuber *v.* Held, 47 Wis. 340, 2 N. W. 779, the effect and scope of these statutes was considered as applied to prescriptive rights in lands owned by the state to flow lands for a milldam. It was there declared that the statute providing that "civil actions can only be commenced within the periods prescribed in this chapter" comprehended all civil actions, including the one under consideration, and that "there is no reason why the presumption of a grant to the adverse claimant, from a delay to bring such action for over twenty years, should not prevail against the state as against other parties." It is said that the construction of the statutes as applied in these cases can be of no force, because the instant case is one for the collection of a tax, and therefore not within the intent of the statute, even should it be comprehended in its terms in their general sense. True, this is a civil action to enforce a demand which does not arise as ordinary contract obligations issuing out of a mere voluntary personal transaction, yet in its essential nature and characteristics it is a demand or obligation enforceable as other state claims by an action in the name of the state or for its benefit. The demand is one which is clearly embraced in the classes covered by the limitation statute providing that an action must be brought within six years after a right of action accrues "upon a liability created by statute, other than a penalty or forfeiture." The demand sought to be enforced here under the claim of the state is manifestly a liability created by statute, for the state asserts that the obligation is one imposed

under the taxing power of the state as an incident to the grant of the privilege of operating its railroad in Wisconsin, conferred by the state on defendant. Under these conditions, the claim is obviously created by statute, in the sense the Legislature employed the words of this statute, and comes plainly within its terms.

We find that a like statute has been applied to a demand for taxes in other jurisdictions, wherein a construction like the one pressed upon us by the state was urged and held unwarranted, in view of the plain meaning and the evident legislative intent as expressed in the phraseology that the limitation should "apply to actions brought in the name of the state or for its benefit, in the same manner as to actions by private parties." In the case of County of Redwood v. Land Co., 40 Minn. 512, 42 N. W. 473, the court construed this statute in a proceeding to obtain a judgment for unpaid taxes. The court said: "That a tax is a liability created by statute we think admits of no doubt, either upon principle or authority;" and held the proceeding to enforce the tax claim "within the meaning of the statute an action upon a liability created by statute,' and that it was barred as to all taxes for the enforcement of which such proceedings might have been instituted more than six years before" when properly assessed. In City and County of San Francisco v. Jones (C. C.) 20 Fed. 188, the same clause in a California statute was held to bar the state from enforcing a tax after the period of limitation had expired. In State of Nevada v. Y. J. S. Mining Co., 14 Nev. 220, this same statute was considered as to its application in an action by the state for the collection of delinquent taxes, and upon an extended review of the authorities and reason bearing on the question the court held that such a statute "embraces every civil action, both legal and equitable, whether brought by an individual or the state. * * * Such is the plain reading of the statute and the evident intention of the Legislature. [Cases cited.]"

We find no justifiable ground for holding that an action for the collection of taxes is not within the operation of the limitation statute, and that the state is not barred from collecting the taxes imposed by section 1213, St. 1898, after the expiration of the period of limitation. This also is the legislative interpretation of the statute as is disclosed by chapter 1, p. 3, Laws 1905, amending it and specifically applying a limitation of 10 years to actions in favor of the state, whether created by statute or otherwise, except those for the recovery of forfeitures and penalties, and actions and proceedings by the Attorney General for the forfeiture of rights, privileges, and franchises pertaining to railroads, to which a shorter period is to apply. It is evident from the context of this act that the Legislature deemed the former statute, so amended, applicable to the classes enumerated in the

amended act, which plainly embraces actions for unpaid portions of license fees such as the state seeks to recover in this case.

It is urged that, if the limitation statute apply to the alleged causes of action, then defendant will not be permitted to interpose the statute because it has fraudulently concealed from plaintiff until the year the existence of these causes of action. This is urged upon the ground that it would be unconscionable to allow defendant to rely on the statute under such circumstances. This claim presupposes that plaintiff was kept in ignorance of its rights through the contrivance and concealment of the defendant. We have, however, no such situation presented here. It is admitted that the defendant made payments under the liability imposed, and the only claim is that it fraudulently omitted to make and render a true and correct report of its annual gross earnings, on which the liability is based. There is nothing to show but that the state had full opportunity to make an investigation of the business so as to ascertain whether such reports were correct. Furtherfore, the state railroad commissioner was called upon to examine such reports in respect to their sufficiency before the annual licenses were granted. The state could not be misled as to its right to enforce any such demand and nothing was done to prevent it from ascertaining everything as to the true state of affairs respecting these claims which might have been ascertained by the exercise of reasonable diligence. We find no justification for this claim of the state in the facts alleged. Were this claim of the plaintiff well founded in fact, still no exemption from the operation of the statute would exist under the provisions of the statutes of limitation. The limitations prescribed have been held applicable to all actions, and the presence of fraud in no instance postpones the running of the statute from the time the cause of action accrued, save the specified exception in subdivision 7, § 4222, St. 1898, for relief on the ground of fraud, in cases, which before February 28, 1857, were cognizable solely by the courts of chancery. As we have heretofore indicated, this cause is of that class wherein a liability, which is legal in its nature and has been created by statute, is sought to be enforced, and would come within the jurisdiction of law but for the fact that the remedy therein does not afford as complete, sufficient, and adequate a remedy as that afforded by the equitable action for an accounting and discovery. It is therefore not within the exception of subdivision 7 of the limitation statute, and hence the statute commenced to run against the cause of action from the time the right of action accrued, which was at the time the annual installments were due in February and August of each year. Recent decisions of this court plainly show that there is no exception to this statute except the one is specified. Jacobs *v.* Frederick, 81 Wis. 254, 51 N. W. 320; Pietsch *v.* Milbrath, 123 Wis. 647, 102 N. W. 342, 68 L. R. A. 945, 107 Am.

St. Rep. 1017; Boyd v. Ins. Co., 116 Wis. 135, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, 96 Am. St. Rep. 948; Hoffmann v. M. E. R. & L. Co., 127 Wis. 76, 106 N. W. 808; Mason v. Henry, 152 N. Y. 529, 46 N. E. 837. Upon the facts alleged in the complaint, it is clear that the state is barred from enforcing any of the alleged claims after the expiration of six years from the time they became due, pursuant to sections 1211, 1212, 1215, St. 1898, until the time was extended by chapter 1, p. 3, Laws 1905, which was published February 4, 1905. At this time all causes of action which had accrued six years before were barred, and were as effectually extinguished as if they had been satisfied by actual payment. Under such circumstances, the right, so created, constitutes property, and the state cannot deprive the party of it by legislative action which enlarges the period of limitation or by creating a new remedy for the collection of such claims. The authorities of this court on this proposition are numerous and clearly settle the law for this state. Eingartner v. Ill. Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871; Pereles v. Leiser, 119 Wis. 347, 96 N. W. 799; Knox v. Cleveland, 13 Wis. 274. These considerations lead to the conclusion that the complainant states good causes of action in equity for any unpaid portions of the license fees that accrued subsequent to February 4, 1899, and that the demurrer should have been sustained as to all alleged causes of action which accrued prior to this date.

Treating the complainant as one in equity for an accounting disposes of the question of the right of the defendant to a trial by jury, as well as to the validity of chapter 328, p. 501, Laws 1905, except so far as it provides in section 3 thereof that defendant in such an action is required to make complete discovery in its answer under oath respecting the subject of the action, for the reason that the provisions of this act require no proceeding or pleading, and grant no relief to which either party was not entitled in equity before its passage, except the discovery to be made in the answer. Aside from this provision it is declaratory only of existing rights, and therefore is not repugnant to any of the constitutional provisions claimed by the defendant. Section 3 imposes the duty on defendant to set forth in its answer "a full, true and complete discovery under oath and a true and accurate account of all moneys received by it in the operation of its railroad" for the period covered by the complaint, without deduction of any of the items specified. This imposes an obligation on defendant in this class of actions not required in any other suits. The statute accomplishes what has usually been done by a bill of discovery. The proceeding by bill of discovery has, however, been absolutely abrogated in this state by section 4096, St. 1898. Kelly v. C. & N. W. Ry. Co., 60 Wis. 480, 19 N. W. 521; Whereatt v. Ellis, 65 Wis. 639, 27 N. W. 630, 28 N. W. 333;

Frawley *v.* Cosgrove, 83 Wis. 441, 53 N. W. 689. This change in procedure has not, however, abrogated the right of discovery, but by examination of the parties in the manner provided by section 4096, St. 1898, has substituted another and totally different procedure. The requirements of section 3, c. 328, p. 501, Laws, 1905, provide an appropriate proceeding for the collection of a tax. The regulation of the procedure for collecting taxes is well recognized as being within the legislative power. In St. Louis *v.* Ferry Co., 11 Wall. (U. S.) 423, 20 L. Ed. 192, it is declared: "It is for the Legislature to decide what persons and property shall be reached by the exercise of this function [the taxing power] and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected." See also, Blackwell on Tax Titles, § 75. It is also well established that the state may prescribe any appropriate remedy for this purpose, which does not deprive a party of notice and reasonable opportunity for compliance, and that it may employ the usual judicial processes and proceedings, or employ them in a modified form to regulate and enforce payment of the public revenue. This power is incident to the exercise of the taxing power. State and Guilford County *v.* Georgia Company, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485; 1 Cooley's Taxation, pp. 15, 16, 17, 18; 21 Enc. Pleading & Practice ("Taxation") pp. 378, 380, 381, 384.

It is furthermore asserted that the legislation is objectionable because it discriminates between members of a class. For the purposes of taxation, railroad companies throughout the history of their existence in this state have been treated as a separate class, and in the recent case of C. & N. W. Ry Co. *v.* State, 128 Wis. 553, 108 N. W. 557, it was held that it is within the legislative discretion to place railway corporations in a class by themselves for the purposes of taxation. In this power to so classify them inheres the authority to provide divers methods of taxation and to provide special instrumentalities and appropriate proceedings to accomplish this purpose. We are of the opinion that the provisions of section 3, c. 328, p. 502, Laws 1905, requiring defendant to make discovery under oath in its answer to the complaint, was properly within the power of the state as an incident to providing a remedy for the collection of taxes, and that for the purposes of imposing and collecting taxes the state could place railroads in a class by themselves.

We are led to the conclusion that the complaint must be sustained as good and sufficient in equity for an accounting and discovery as to the causes of action which accrued subsequent to February 4, 1899, and that the additional requirements of section 3, c. 328, p. 502, Laws 1905, are properly imposed on defendants in an action for the collection of any unpaid portion of

the license tax. The demurrer should have been sustained to all causes of action set out in the complaint which were barred by the statute of limitation and overruled as to all causes of action not so barred.

The order overruling the demurrer to the complaint must therefore be reversed, and the cause remanded, with directions to enter an order in accordance with this opinion. It is so ordered.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* SAUNDERS.

(Supreme Court of Texas, Jan. 8, 1908.)

[106 S. W. Rep. 321.]

Railroads—Failure to Signal at Crossings—Negligence.*—The statute requiring that the whistle on a locomotive shall be sounded 80 rods from a public crossing, or the railroad shall be liable for damages sustained by reason of such neglect, provides for the protection of those who use railroad crossings, in which case the omission to give the signal is negligence per se, and an instruction that the absence of signals would be negligence as to one on the track near a crossing was erroneous.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by H. T. Saunders against the Missouri, Kansas & Texas Railway Company of Texas. There was a judgment of the court of Civil Appeals (103 S. W. 457) affirming a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Coke, Miller & Coke and *Head, Dillard & Head,* for plaintiff in error.

McGrady & McMahon, for defendant in error.

WILLIAMS, J. Defendant in error, who was plaintiff below, was struck by an engine of the plaintiff in error at the town of Trenton, and recovered the judgment now before us for the injuries thereby inflicted. Two dirt roads cross the track of the defendant, one 150 or 200 yards south, and the other some dis-

*For the authorities in this series on the question whether it is actionable negligence to have failed to give crossing signals where the accident was not at the crossing, see foot-notes appendedd to Everett *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 259, 46 Am. & Eng. R. Cas., N. S., 259.

tance north of the station. On the morning when he was hurt the plaintiff drove some cattle out of a field southeast of the crossing to the south of the station. The animals passed the track going west, and went north upon the right of way and plaintiff, when he reached the crossing, also turned north, but followed the track, intending to drive the cattle westward, towards his home. He moved in a run or rapid walk along the end of the ties until he reached the gravel passenger platform of defendant, and then passed along its edge nearest the track. When he was 150 or 175 yards from the southern crossing, he was overtaken and struck by an engine drawing a passenger train which came rapidly from the south. Defendant had three whistling posts south of its depot, the farthest for the station signal, the next for the southern crossing, and the third for the northern crossing. Some of the evidence tended to show that only the station signal was given and that plaintiff did not hear it, while probably he would have heard signals for the crossings if they had been given. The trial court gave in its charge the provision of the statute requiring the giving of signals for crossings, and instructed that a failure to give them would be negligence, for which plaintiff would be entitled to recover if he was hurt as the proximate result of such omission, and was not himself guilty of negligence. The giving of this instruction was the reason for the granting of this writ of error.

The question as to the correctness of the charge depends upon the further question whether or not the failure to give crossing signals was negligence per se as to one situated as plaintiff was. The decisions of this court leave no doubt that such a failure is by law made negligence with respect to those for whose protection the statute was designed. As to others the omission may or may not constitute negligence; in fact, the question depending on the circumstances of the particular case, and being one for the jury, and not for the court, to determine. The charge under consideration took from the jury the question whether or not the omission to give the signals was, with reference to the plaintiff, a negligent one, and it can be justified only if it be found that the statute imposed the duty for the protection of one in a position such as that of plaintiff. There are many decisions in other states based upon statutes like ours which would sustain the charge and the opinion of the Court of Civil Appeals approving it, and there are quite as many, if not more, that hold to the contrary. They are cited in Elliott on Railroads, §§ 1150, 1158, 1264; 2 Thompson on Negligence, §§ 1560, 1561. The decisions of this court hold with the latter view. I. & G. N. R. R. Co. *v.* Gray, 65 Tex. 32; M., K. & T. Ry. Co. *v.* Thomas, 87 Tex. 282, 28 S. W. 343; T. & P. Ry. Co. *v.* Shoemaker, 98 Tex. 455, 84 S. W. 1049. The statute requires the blowing of the whistle and the ringing of the bell at least 80 rods "from the place where the

railroad shall cross any public road or street," and the continued ringing of the bell until the engine shall have crossed the street or stopped. It imposes a penalty upon any engineer neglecting to comply, and makes the company "liable for all damages which shall be sustained by any person by reason of such neglect." These signals are required because of the nature of the place, a crossing of the railroad by a road or street which others have the right to occupy and use with their persons and property. The deduction seems plain that the protection is given to those who are exercising their right with respect to the road or street. The requirement is not adapted to the protection of others; the warning being required only at a certain distance from the highway and until it has been passed. The existence of the crossing fixes the relation to the railway of the road or street and of those exercising the right to use it, and the provision is a definite protection to them; but, if we attempt to apply it to others, to persons or property whose position is not influenced by the existence of the crossing, or any right they have to use it, we have no definite guide. We can see a cogent reason why this protection should be given to persons or property passing along the road or street, but it would be difficult to find a reason for giving such a protection to one person near a crossing and withholding it from another farther away, when the crossing has no influence whatever over the situation of either.

The rights of those using the road or street crossing the railway should not be narrowly restricted as is sometimes attempted. It is not at all necessary to hold that they must be at the point of intersection. Perils are encountered in the use of roads which cross railways other than those of collisions with passing cars; but they result from the situation of the highway in relation to the railway, and this relation moved the Legislature to make the provision in question, and clearly indicates the classes for whose benefit it was intended. In Railway *v.* Gray, *supra*, Chief Justice Willie thus accurately states the true doctrine: "Whilst the statutory signals to be given at road crossings are intended as warnings to persons upon the road or near the crossing, the failure to give them may be taken into consideration, together with other facts, to show want of reasonable care on the part of the company as to other parties lawfully upon the railway. W. & A. Ry. Co. *v.* Jones, 8 Am. & Eng. Ry. Cas. 267. In the one case the omission of the signals is negligence per se, and may be so declared by the court. In the other it may or may not be negligence under the circumstances, and the jury must pass upon the question. In the case above cited the law required that the whistle should be blown, and the speed of the train checked, upon approaching a public crossing. It was held that, whilst these provisions were intended to protect life and property at such crossings, yet, when an accident occurred just beyond a cross-

ing, the fact that these requirements were disregarded might be considered by the jury in determining the question of negligence on the part of the railroad company." In Railway *v.* Shoemaker, *supra*, this language was used: "No one can say from the evidence that the boys were at the crossing or that the failure to give the signals had anything to do with the deaths. So far as any inference can be drawn from the appearances stated, it is that they were upon the track and away from the crossing. The specific duty to give the signals was to those using the crossings, and not to persons at other places. The absence of such signals may sometimes affect the conduct of persons on the track at other places than crossings, and so it might, if all the facts were known affect the question of contributory negligence here; but by itself it constitutes no breach of any duty to the boys, so far as can be seen from the evidence." While nothing is said as to the particular question before us in Railway *v.* Thomas, the construction there put upon the statute and the conclusion announced that it applies only to crossings at grade, and is not intended for the benefit of those passing with teams under overhead crossings, are wholly irreconcilable in principle with the decisions of the class first above referred to, which, in effect, so construe the statute as to make it include among those towards whom it is made the duty to give these signals all who are so situated as to hear and be benefited by them when given. Plainly, if this be the purpose of the statute, such a duty could not be held to depend upon the character of the crossing, whether at grade or otherwise, and so it is held in some of the decisions of the kind followed by the Court of Civil Appeals. If the duty to give the signals is made a statutory duty towards all who may happen to be near enough to a crossing to hear them and be governed in their conduct by them, certainly that duty existed towards the plaintiff in the Thomas Case, and the fact that the road passed under the railway could not have affected it. Therefore, when the court decided that the statute did not apply to such a crossing, it necessarily negatived the construction contended for by defendant in error.

The doctrine laid down by Chief Justice Willie in Railway *v.* Gray admits allegation and proof of the failure to give such signals as a fact to be considered by the jury in determining whether or not under the facts of a particular case there was, in fact, negligence on the part of a railway company in the conduct of its business; and, in order to explain the bearing of such evidence, the court may inform the jury of the statutory provision, provided it leaves to them the decision from all of the evidence of the ultimate question of negligence vel non. No more than this was done in the case of H. & T. C. Ry. Co. *v.* O'Donnell (Tex. Civ. App.) 90 S. W. 886; s. c. (Tex. Sup.) 92 S. W. 409. Persons on or about railroad tracks, whether at

crossings or not, are likely to take notice of the manner in which trains are required to be run and in which they are, in fact, run and to be misled by the absence of those things which usually indicate their approach. Hence the propriety of inquiring into such matters in determining questions of negligence on the part, not only of such persons, but of those operating the trains. A striking instance of this kind of an inquiry is found in the case of Murphy *v.* G. H. & N. Ry. Co., 101 S. W. 439, 18 Tex. Ct. Rep. 220, 9 L. R. A. (N. S.) 762. But the purpose of such an investigation is to so inform the jury as to enable them intelligently to pass upon the question of negligence. The statute in question imposes a duty the nonobservance of which constitutes negligence wth respect to those for whose benefit the duty is imposed, viz., users of the road or street. Others must rely upon the common-law duty of railroad companies to exercise ordinary care for their protection, and whether or not such care was exercised is a question for the jury, and not for the court.

We are cited to several opinions by the Court of Civil Appeals which lay down the doctrine relied on by defendant in error. It is well stated in the opinions of Mr. Justice Stephens in Railway *v.* Taff, 31 Tex. Civ. App. 657, 74 S. W. 89, and of Mr. Justice Bookout in Railway *v.* Kilman (Tex. Civ. App.), 86 S. W. 1050. The latter case was never passed upon by this court. In the former a writ of error was applied for and refused. But, as will appear from Judge Stephens' opinion, the view expressed of the statute was not essential to the decision, for the reason that it appeared beyond controversy that there was negligence, in fact, in the operation of the train which ran upon the hand car upon which plaintiff was traveling. The case was one of those in which the trial court could have instructed that the defendant's servants conclusively appeared from the evidence to have been guilty of negligence, without reference to the statute. The refusal of the writ of error, therefore, did not approve the views expressed as to the effect of the statute. The question was different in Railway *v.* Matthews, 34 Tex. Civ. App. 302, 79 S. W. 71. There the contention of the defendant was that the requirement that the trains of one railroad shall stop before crossing another is intended, not for the protection of pedestrians at such crossings, but to prevent collisions of trains upon the two roads. This was the contention that was not upheld. The deceased in that case was upon the track of the defendant, and for all practical purposes at the crossing. In the case of Railway *v.* Nixon, 52 Tex. 19, the accident occurred at the crossing of the railway and a street. While the opinion of the Court of Civil Appeals in the O'Donnell Case, before referred to, cites with approval the Taff and Kilman Cases, the charge passed upon contained no such feature as that now under review, but left to the jury the question of negligence under all the facts.

It is evident from the facts stated that the danger to which plaintiff in this case was subjected arose from no use he was making, had made, or was intending to make, of the road or the crossing. His situation was not different from that of any other person on or near a railroad between crossings. We are therefore of the opinion that the charge was error; and, since it cannot be said that the facts conclusively show that the omission to give the crossing signal was negligence towards him, the judgment must be reversed.

Reversed and remanded.

HOLMES et ux. *v.* MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Nov. 6, 1907.)

[105 S. W. Rep. 624.]

Railroads—Operation—Accidents at Crossings—Duty of Engineer.* —It is the duty of an engineer driving an engine through a populous street of a city, where persons on foot and in vehicles are to be expected, to keep a vigilant watch for persons not only on, but approaching, the track, and to have the engine in reasonable control so as to stop it if necessary when a danger that could reasonably have been anticipated arises, and his field of observation to avoid danger is as wide as the field which the danger created covers, and the degree of care required is commensurate with the degree of danger.

Negligence—Liability of Defendant—Concurrent Negligence of Other Persons.†—In an action for tort it is not necessary that the evidence should show the injury to be the result of defendant's negligence alone, for a defendant may be liable if his negligence contributes with that of third persons. In such case defendant is held liable only for his own negligence, without the contributing force of which the other negligence would not have caused the injury.

*For the authorities in this series on the subject of the care required in running steam railroad trains in streets, see foot-notes appended to Eichorn *v.* New Orleans, etc., Co. (La.), 13 R. R. R. 128, 36 Am. & Eng. R. Cas., N. S., 128; foot-notes appended to Johnson *v.* Louisville & N. R. Co. (Ky.), 22 R. R. R. 658, 45 Am. & Eng. R. Cas., N. S., 658 (Ky.), 22 R. R. R. 658, 45 Am. & Eng. R. Cas., N. S., 658; McCabe's Adm'x *v.* Maysville & B. S. R. Co. (Ky.), 21 R. R. R. 852, 44 Am. & Eng. R. Cas., N. S., 852.

†For the authorities in this series on the subject of concurrent negligence, see foot-notes appended to Memphis St. Ry. Co. *v.* Haynes (Tenn.), 13 R. R. R. 384, 36 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to French *v.* Grand Trunk Ry. Co. (Vt.), 13 R. R. R. 426, 36 Am. & Eng. R. Cas., N. S., 426; Smith *v.* Fordyce (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

Holmes *v.* Missouri Pac. Ry. Co

Same—Effect of Contributory Negligence.‡—A defendant guilty of negligence is ordinarily relieved from liability for his own conduct if the person injured was himself guilty of negligence contributing to the result, not because defendant is less culpable, but because of public policy.

Same—Degree of Care Required—Children.—Where the youth and immaturity of a child are obvious, a person coming in contact with him is chargeable with knowledge of the facts, and cannot indulge the presumption that the child will do what is necessary to avoid impending danger. Hence one seeing such a child in a dangerous position is negligent if he does not take into account the fact that it is a child, and regulate his conduct accordingly.

Same—Contributing Cause—Child's Act—Effect.—Where defendant's negligence contributes with the act of a child to produce an injury to it, but the child because of its youth and immaturity, is not adjudged negligent, defendant is not charged with the child's conduct, but merely not excused for his own.

Railroads—Accidents at Crossings—Actions for Injuries—Instructions.—Where an instruction, in an action against a railway for the death of a child, authorized the jury to find for plaintiffs only on the theory that the child was at the time exercising the degree of care which could be expected of one of his age, discretion, and experience, it was not necessary, as in cases involving the humanitarian doctrine, to show that the conduct of the engineer was willful, wanton, or reckless.

Same—Sufficiency of Evidence—Negligence.—In an action against a railway company for the death of plaintiffs' infant intestate, evidence held sufficient to sustain the verdict on the issue of defendant's negligence.

Same—Questions for Jury—Contributory Negligence of Child.—In an action against a railway company for the death of an eight year old child at a crossing, whether the child was of sufficient maturity to be adjudged guilty of negligence held, under the evidence, for the jury.

Fox and Graves, JJ., dissenting.

In Banc. Appeal from Circuit Court, Johnson County; Nick M. Bradley, Judge.

Action by C. W. Holmes and wife against the Missouri Pacific

‡For the authorities in this series on the question whether there may be a recovery for simple negligence where there was also contributory negligence, see foot-notes appended to MacFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to Harris *v.* Lincoln Traction Co. (Neb.), 23 R. R. R. 339, 46 Am. & Eng. R. Cas., N. S., 339; Byrnes *v.* New York, etc., R. Co. (Mass.), 23 R. R. R. 317, 46 Am. & Eng. R. Cas., N. S., 317.

Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

See 88 S. W. 623.

R. T. Railey, for appellant.

O. L. Houts and *Chas. E. Morrow,* for respondents.

VALLIANT, J. Plaintiffs' child, eight years old, was struck and killed by a locomotive engine drawing a passenger train on defendant's road at the crossing of Warren avenue in the city of Warrensburg. The petition charges that the injury was caused by the negligence of defendant's servants operating the engine. This is the second appeal in this case. At the first trial the court gave a peremptory instruction to the jury at the close of the plaintiff's evidence to find for the defendant. From the judgment following the verdict on that instruction the plaintiffs appealed. On that appeal this court reversed the judgment and remanded the case to be retried. The evidence before us then tended to show negligence on the part of the defendant's servants operating the engine causing, or contributing to cause, the injury, and also negligence on the part of the child also so contributing, unless it should be found that on account of the tender years and immaturity of the child he was incapable of committing negligence in the legal sense of that term. We then held that whether the child, under the facts shown in the evidence, was capable of committing negligence in that sense, was a question of fact for the jury, and not for the court. The cause went back and was retried in the circuit court, and that question was submitted to the jury. The verdict was for the plaintiffs for the statutory penalty $5,000, and the defendant has now appealed. The evidence for the plaintiffs at the second trial was the same as that at the first trial, with perhaps some slight changes which we will presently notice. Therefore it will not be necessary to restate the substance of that evidence now, but it will be necessary to read the opinion on the former appeal in connection with this for an understanding of the case made by the plaintiffs' evidence, and also for an understanding of what the court then decided as to the law of the case as it was then presented. Holmes *v.* Railroad, 190 Mo. 98, 88 S. W. 623. At the second trial defendant introduced a number of witnesses, whose testimony tended to contradict that of the plaintiffs' witnesses in some particulars, especially in reference to the ringing of the bell and the sounding of the whistle, and the learned counsel for defendant thinks that his evidence also shows that the child saw this train coming and recklessly threw himself in front of it.

In reference to the sounding of the whistle, three places along the railroad are mentioned by the witnesses: First, the Ft. Scott crossing, which is one mile west of Warren street, the place of the accident; second, the whistling post near the brewery, a

quarter of a mile west of Warren street; and, third, Mulberry street, 650 feet west of Warren street. The testimony shows without conflict that the road-crossing whistle signal was given at the Ft. Scott crossing, and it shows with but little conflict that the whistle sounded the station signal at the whistling post near the brewery, and although there was some evidence on behalf of the defendant that the whistle was sounded at the Mulberry Street crossing, yet even the defendant's engineer does not sustain that position, and the testimony is in irreconcilable conflict on the point of the sounding of the whistle after it sounded at the brewery. The testimony of the engineer was that he sounded the whistle at the whistling post near the brewery, and not again until he sounded the danger signals when he was within a hundred feet of the crossing, when he saw that the boy that was in front was within 40 or 50 feet of the crossing and aiming to cross. The testimony for the plaintiffs was that the whistle was not sounded after passing the brewery until in the instant of the accident. The evidence showed that the engineer could have seen these boys when he was from 500 to 700 feet distant, and they were from 130 to 150 feet from the track running towards it. Yet he testified that he did not look to the right or left beyond the railroad right of way. He said: "I was looking along the track. Q. You were not looking south of the crossing at all? A. Not any particular distance south. Q. You just looked along the track? A. Yes, sir. Q. And you never looked south of the crossing to see who was coming down that street at all, until you saw this boy, did you? A. Nothing that attracted my attention. Q. I say you were not looking out that way? A. I wasn't especially looking down the street. * * * I saw when he was in, well, my vision would reach out 40 or 50 feet on each side of the track. Q. But you didn't look out any further than that? A. I didn't try to look out any further, I don't know as I could see any further." The engineer also testified: "Q. Well, you saw this boy (meaning the one that was in the lead)? A. Yes, sir. Q. How far was he from the track? A. I think 40 or 50 feet. Q. And he was running? A. Yes, sir. Q. Right towards the track? A. Yes, sir. Q. And looking north? A. Yes, sir; looking ahead of him." He also testified that the boy crossed the track within 10, 12 or 15 feet in front of the engine. The engineer must have been mistaken in his estimates. The boy was either very much nearer the track when the engineer discovered him, or else the engine was very much farther from the crossing than the engineer estimated, because, if the engine was going 30 or 35 miles an hour, as the plaintiffs' witnesses say it was, or even if it was going only 20 miles an hour, as the engineer says it was, it was going several times as fast as the boy was, and if the boy was 40 or 50 feet away, and the engine was only 100 feet distant, it would have crossed over before the boy had covered half the

distance he was to go. The defendant's testimony was that the bell was being rung continuously from the time the engine passed the whistling post at the brewery until the accident occurred. The testimony for the plaintiffs was to the contrary. On that point it may be said there was substantial testimony on both sides.

Defendant's learned counsel attach some importance to a sentence that occurs in the statement of the facts of the case in the opinion on the former appeal, viz.: "There was a freight train standing on a side track just east of the crossing 'with steam on and puffing,' and the attention of the boys was attracted to it as they ran along." It is not disputed that the freight train was there, headed for the crossing, waiting the coming of this passenger train, and that it was "with steam on and puffing"; but it is contended that it was an assumption of fact, without evidence, to say that the attention of the boys was attracted to it, because it is said, that the only testimony that the attention of the boy who was killed was attracted to the freight train was that of the other boy, who escaped, and who testified that he was noticing the freight train, and he supposed his brother was doing so also. Whether the attention of the boys was attracted to the freight train, and they were hurrying to get across in front of it, cannot be known as with absolute certainty, but it was an inference that was naturally to be drawn from the circumstances. These two children were in the habit of crossing that track daily going to and coming from school. Their attention had been called by their grandmother and their teacher to the danger that attended the crossing. Therefore, when they saw one of these dangerous machines against which they had been warned emitting noise and steam, puffing under the restraint of being held, who can say what effect it had on the timid imagination of a child eight years old?

The nine year old brother of the child that was killed testified that he saw the freight train and was running to get across ahead of it, and on this second trial he testified that he told his brother, who was a few feet behind him, to get across out of the way of the freight train. He also testified that he did not at that time see the passenger train. Thus we have the positive testimony of one of the boys that his attention was attracted to the freight train, and that he attracted his younger brother's attention to it, and the conduct of both was consistent with that fact. Defendant insists that the evidence shows that the deceased child saw this passenger train, yet he went headlong into the danger. If that was the fact, it would be a very strong circumstance to prove that the child was not of sufficient discretion to be held guilty of contributory negligence. No sane person of mature years, not bent on suicide, would have acted as that child did if he had

seen the train coming so close to him. But the testimony of the witness on whom the defendant relies to prove that fact is not clear or satisfactory. That witness said he saw the boys as they approached the crossing. "One was looking pretty straight ahead. But the other one was watching back west. Looked to me like he was watching the train." The witness was not near enough to have a very minute view of the boys, and he was not engaged in any business that required him to give them particular attention. He was inaccurate in his description of their movements. He said they came from the north side of the track, crossed over to the south side, and were "sort of standing there," and then turned north again towards the track. His testimony as to the movements of the boys is in conflict with that of all the other witnesses, and he was the only one who undertook to say that the deceased boy had his face turned west. All the other witnesses said that both the boys were facing north. At the close of the plaintiffs' evidence, and again at the close of all the evidence, the defendant asked an instruction to the effect, that the plaintiffs were not entitled to recover, which instruction the court refused, and defendant excepted.

The cause was submitted to the jury under the following instructions for plaintiffs: "The jury are instructed that, in approaching the crossing of Warren street with its passenger train mentioned in evidence, it was the duty of defendant's engineer in charge of said train, and the law required him, to be watchful and on the lookout for persons traveling on the street, so as to avoid injuring them. (2) And if the jury believe from the evidence that Freeborn G. Holmes was traveling on said Warren street and approaching defendant's track where the same crosses said street, and that he was at the time of and just preceding the injury in the exercise of such care and caution as a person of his age, discretion, and experience would naturally and ordinarily use under similiar circumstances, and that defendant's said engine and train approached said Freeborn G. Holmes and said crossing along its said track, and he was, or was about to place himself, in danger of being struck by said engine and train and injured, and that defendant's said engineer in charge of said train saw, or by the exercise of ordinary care could have seen, his said danger, or that he was about to place himself in a position of danger, in time by the exercise of ordinary care to have sounded the whistle on said engine, or to have stopped said train, or checked the speed of said train, and prevented injury to said Freeborn G. Holmes, and that defendant's said engineer in charge of said train failed to exercise such ordinary care, and failed to sound said whistle, or failed to stop said train, or failed to check the speed of said train, and that by reason of such failure to exercise such ordinary care said whistle was not sounded, or said train was not stopped, or the speed of said train was not checked, and by reason

thereof the said Freeborn G. Holmes was struck by said engine and train and killed, then you must find for the plaintiffs on the second count in their petition. (3) The court instructs the jury that it was the duty of defendant's employees in charge of its locomotive and train to ring the bell on the engine at Mulberry street, and keep the bell ringing until the engine crossed Warren street. And if the jury believe from the evidence that defendant's said employees did not so ring said bell, and by reason thereof Freeborn G. Holmes, while in the exercise of such care as ought reasonably to have been expected from one of his age and capacity, was struck and killed by the said engine, then the jury must find for the plaintiffs on the first count of the petition. (4) If the jury believe from the evidence that Freeborn G. Holmes was a boy of immature age, and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected for one of his age and capacity, then he was not guilty of contributory negligence." Exceptions to the giving of those instructions were duly preserved. There were also instructions defining ordinary care, the amount of the verdict if for the plaintiff, and the form of the verdict, etc.

The main insistence of the defendant now is that the court should have given the peremptory instruction for a verdict for the defendant. So far as the question of the defendant's negligence is concerned, we think the testimony is stronger for the plaintiffs now than it was when the case was here on the former appeal. Even the defendant's testimony has strengthened the plaintiffs' case in that particular. The engineer testified that he did not look to the north or to the south of his track to see if any one was approaching it. He really seemed to be of the opinion that it was no part of his duty to look elsewhere than in the narrow space of the railroad track. That idea seems to be embodied in one of the instructions asked by defendant and refused, viz.: "If the jury believe from the evidence that deceased was struck by locomotive at Warren Street crossing, before he got upon defendant's track, then your verdict must be for defendant, regardless of all other issues herein." To lay the foundation for that instruction, the defendant endeavored to show that the child was struck, not by the cowcatcher, but by the pilot beam, and therefore he was not between the rails, and therefore the defendant was not liable. It is the duty of an engineer driving a dangerous engine through a populous street of a city, where men, women, and children on foot and in vehicles of all kinds are to be expected, to keep a vigilant watch for persons not only on but approaching the track, and to have the engine in reasonable control so as to be able to stop, if necessary, when a danger that could have been reasonably expected to arise does arise. His duty in this respect is different when he is going through a populous part of a city from what it is when he is on a part of the railroad

where people are not expected to be. In many of the cities of this state there are ordinances limiting the speed of such engines to six miles an hour, and this court has repeatedly held such ordinances valid. Yet here was an engineer running his engine in a populous part of the city at the rate, according to plaintiffs' witnesses, of 30 to 35 miles an hour; according to his own testimony, 20 miles an hour. Yet he says that he did not try to look to the right or the left of his track, and the result was he did not see these boys until they were so close to the track that it was impossible to avoid the accident. His duty was, of course, to look ahead, and not lose sight of his track; but the eye is quick of motion, and a glance to the right and the left would not have impaired his view of the track. He could have seen these children certainly when he was within 500 feet of the crossing, and if he had looked he would have seen that they were running into danger, and if he had then sounded the danger signal he might have avoided killing the child. But his testimony gives the impression that he did not consider it within the field of his duty to look beyond the track before him, and an instruction asked by defendant seems to imply that defendant's view of the law is that, unless the child was actually on the track between the rails, when he was struck, the verdict must be for the defendant, "regardless of all other issues." If that engineer was taught that he was under no obligation to look to the right or the left of his track when running his engine at a high rate of speed in a populous part of a city, or that he was charged with care to avoid injuring people only when they were actually on his track, his teaching was wrong. His field of observation to avoid danger was as wide as the field which the danger he created covered. The degree of his care was commensurate with the degree of the danger. In Livingston v. Wabash, 170 Mo. 452, 71 S. W. 736, the railroad company contended that the engineer was under no obligation to do anything to avoid injuring the child until it was actually on the track; but this court held that it was his duty to have seen the child running towards the track, and to have done what he could under the circumstances to prevent the injury, and we so hold in this case.

In the brief for defendant, pages 61 and 139, the idea is advanced that the only theory on which the plaintiffs' judgment could be sustained would be that the defendant is liable for the consequences of the reckless conduct of the deceased child. That is a misconception of the theory on which the defendant's liability rests. The defendant is liable only for its own negligence, and, if its plea of contributory negligence is not sustained, still it is not charged with the consequence of the child's negligence, but it is only not excused thereby for the result of its own negligence. It is not always essential to a plaintiff's recovery, in an action for

tort, that the evidence should show that the accident was the result of the defendant's negligence alone. A defendant may be liable if his negligence contributes with that of a third person to produce the injury complained of. In such case he is not held liable for the negligence of the third persons, but only for his own negligence, without the contributing force of which the negligence of the third person would not have caused the injury. But the policy of the law is such that ordinarily a defendant guilty of negligence is relieved from the liability for his own conduct if the person injured was himself guilty of negligence that contributed to the result. On that theory the defendant's act is none the less negligent, and he is none the less cupable; but the law will not allow a plaintiff to recover when he himself, or the person for whose injury he sues, was also guilty of negligence contributing with that of defendant to the result. There is reason and justice in that policy of the law. It is an admonition to every one to exercise due care for his own safety, and it authorizes another to presume that he will do so, and, so presuming, adjust his own conduct. But common experience tells us that a child may be too young and immature to observe the care necessary to his own preservation, and therefore, when a person comes in contact with such a child, if its youth and immaturity are obvious, he is chargeable with knowledge of that fact, and he cannot indulge the presumption that the child will do what is necessary to avoid an impending danger. Therefore one seeing such a child in such a position is guilty of negligence, if he does not take into account the fact that it is a child, and regulate his own conduct accordingly. An act in relation to a person of mature years might be free from the imputation of negligence, while an act of like character in view of a child would be blameworthy. Therefore, when the law says to the defendant, "although the act of the deceased child contributed with your act to produce the result, yet, because of his youth and immaturity, he is not adjudged guilty of negligence," it does not charge the defendant with the consequence of the child's conduct, but it only does not, for that reason, excuse him for its own negligence. If the defendant, in such case, had been guilty of no negligence, there would have been no accident.

It is also insisted in the brief for defendant that it cannot be held liable because, it says, there was no evidence tending to show that the conduct of the engineer was willful, wanton, or reckless. The learned counsel is there considering the case from the standpoint of what we have in former cases called the humanitarian rule, which allows a plaintiff to recover under certain circumstances, although he has himself been negligent. We need not discuss the question of whether or not there was evidence tending to show that, after the engineer saw the child in

peril, he could, with the means at hand, and under conditions as they existed, by the exercise of ordinary care, have averted the accident, because the case was not given to the jury with that question in it. The instructions authorized the jury to find for the plaintiffs only on the theory that the child was at the time exercising that degree of care which could be expected to one of his age, discretion, and experience, and an instruction given at the request of the defendant was that if the child failed to exercise such care and caution as an ordinary prudent boy of his age and capacity should have exercised under the circumstances, and by reason thereof contributed to his own death, then your verdict must be for the defendant, regardless of all other facts in the case.

Taking the testimony for the plaintiffs and that of the defendant together, we think it was sufficient to sustain the verdict on the issue of defendant's negligence. As to the plea of contributory negligence, it is simply a question of whether this child was old enough and mature enough to be chargeable with the consequence of his act. If he had looked west, he would have seen this train, and, if he did not look, he was negligent, if one of his years and maturity is to be adjudged guilty of negligence, and if he did look, and did see the train, yet ran on, thinking to beat it over the crossing, his act is to be attributed either to the immaturity of his childish judgment in attempting to calculate the speed of the train compared with his own speed, or else incapacity to appreciate the danger, or, if he was of sufficient maturity, then his act must be attributed to a spirit of foolhardy daring. But a child of eight years, though he may know the danger, has not always the coolness of judgment in the face of the danger to avoid it, and often the unfortunate conduct of a child in the presence of a startling danger is attributable to timidity rather than daring; to immaturity, rather than foolhardiness. Desperate daring and recklessness are not attributes of childhood. They belong to men whose nerves have hardened with experience.

In the first appeal in this case, we said that whether this child was of sufficient maturity to be adjudged guilty of negligence was a question of fact for the jury. On the second trial that question was submitted to the jury with appropriate instruction, and we see no reason for disturbing the verdict.

The judgment is affirmed.

SOUTHERN RY. CO. *v.* THOMPSON.

(Supreme Court of Georgia, Oct. 8, 1907.)

[58 S. E. Rep. 1044.]

Railroads—Fires—Actions—Instructions.—The charge did not accurately state the contention of the defendant as set out in the answer.

Same.—A railroad company is liable for damages to property proximately caused by a fire negligently set out by the running of one of its engines.

Same—Negligence—Presumption.*—If, without more, it should be shown by evidence that a fire was set out by the operation of an engine of a railroad company, a presumption would arise that the company or its agents were guilty of the acts of negligence alleged in the petition.

Same—Rebuttal.—If such a presumption arises, it may be rebutted by evidence. This may be done by evidence introduced by the plaintiff, as well as that introduced by the defendant.

Same.†—If the presumption of negligence arises against the defendant, it must show that it and its agents used all ordinary and reasonable care and diligence in regard to the matters charged against it.

Same—Safe Appliances—Operation.‡—Such ordinary care and diligence must be used as well in the equipping of its engine with proper appliances for preventing fires, and keeping them in proper condition, as in the operation of the engine.

Same—Degree of Care Required.‡—The measure of diligence which the law places upon a railroad company, in respect to the providing and keeping in repair of spark arresters or other appliances for the prevention of fire, is to use ordinary care and diligence to apply to its engines the best appliances in general use, the use of

*See foot-notes appended to Shipman *v.* Chicago, B. & Q. R. Co. (Neb.), 22 R. R. R. 748, 45 Am. & Eng. R. Cas., N. S., 748; foot-notes appended to St. Louis, etc., Ry. Co. *v.* Dawson (Ark.), 22 R. R. R. 612, 45 Am. & Eng. R. Cas., N. S., 612.

†For the authorities in this series on the question whether the burden is on the railroad to prove that the engine setting a fire was properly equipped, see foot-notes appended to Norfolk & W. Ry. Co. *v.* Fritts (Va.), 18 R. R. R. 246, 41 Am. & Eng. F. Cas., N. S., 246; foot-notes appended to Cincinnati, etc., Ry. Co. *v.* South Fork Coal Co. (C. C. A.), 17 R. R. R. 280, 40 Am. & Eng. R. Cas., N. S., 280; foot-notes appended to Toledo, etc., R. Co. *v.* Fenstermaker (Ind.), 16 R. R. R. 855, 39 Am. & Eng. R. Cas., N. S., 855; Phillips *v.* Durham & C. R. Co. (N. Car.), 17 R. R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704.

‡See foot-notes appended to St. Louis, etc., Ry. Co. *v.* Dawson (Ark.), 22 R. R. R. 612, 45 Am. & Eng. R. Cas., N. S., 612.

which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in good order.

Same—Right of Way—Negligent Condition.§—If the company is wanting in ordinary care in allowing grass, weeds, rotten wood, and other combustible material to accumulate on its right of way, and as a result thereof damage by fire occurs, this would also furnish a ground for holding the company liable.

Trespass—Damage to Freehold—Possession.—Actual possession will support an action of trespass against a wrongdoer. If nothing appears to the contrary, such actual possession is sufficient prima facie evidence of title to authorize a recovery of damages to the freehold.

(Syllabus by the Court.)

Error from Superior Court, Wayne County; T. A. Parker, Judge.

Action by Ely Thompson against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Thompson brought suit against the Southern Railway Company to recover damages caused by a fire which was alleged to have burned certain cross-ties, a number of panels of a fence, a dwelling house, and a corncrib, and standing timber. The negligence alleged was that the defendant, by itself, agents, servants, or employees, in the careless and negligent handling of the cars, engines, or other machinery upon the railroad, or in the negligent and careless use of defective engines, cars, and other machinery operated thereon, permitted and allowed fire to ignite the weeds, grass, rotten wood, trash, and other combustible material that had been carelessly allowed to accumulate upon the right of way of the railroad, by the throwing out or emission of fire, sparks, live coals, or cinders from the engines, cars, or other machinery, which said fire so kindled was communicated to and upon the land of the petitioner, and thus injured, damaged, and destroyed his property, etc. Negligence was also alleged in allowing the right of way to grow up in grass and weeds, and to have on it trash and other combustible matter. The defendant denied all the allegations of negligence. The jury found for the plaintiff $250. A motion was made for a new trial, which was overruled, and the defendant excepted.

Bennett & Conyers and *Littlefield & Poppell,* for plaintiff in error.

Jas. R. Thomas and *C. C. Tindall,* for defendant in error.

§For the authorities in this series on the duty of a railroad to keep its right of way free of combustibles, see foot-notes appended to Atchison, etc., Ry. Co. *v.* Sprague (Kan.), 22 R. R. R. 330, 45 Am. & Eng. R. Cas., N. S., 330.

LUMPKIN, J. (after stating the facts as above). 1. One ground of the motion for a new trial complained that the court incorrectly stated the contentions set out in the defendant's answer, and placed upon it a heavier burden than it assumed, or than the law put upon it. The presiding judge charged that the defendant had filed a plea; that it denied liability, or "that it was in any manner negligence"; that, if the fire was set out by the engine, "it could not be avoided"; and that the company had used all ordinary and reasonable care and diligence in operating, equipping, and providing the engine with the most modern and best known appliances for the purposes of preventing the omission of sparks and fire, and was therefore not liable. The plaintiff alleged certain acts of negligence. The defendant denied them. This charge elaborated the issue thus made in the pleadings, and, in doing so, attributed to the defendant certain positions which were stronger than its denial of the plaintiff's allegations. The plaintiff did not deny that "it was in any manner negligent." It denied that it was guilty of acts of negligence charged by the plaintiff. Nor did it state in its answer that, if its engine set fire to the property, "it could not be avoided"; nor did it make the affirmative allegation in regard to its appliances mentioned above. It is probable that the presiding judge in charging on these subjects had in mind some of the developments of the evidence, and the contentions which he thought arose out of it. But, as delivered, the charge apparently had no reference to the pleadings. Even with reference to the evidence, as will be seen from what has been said above, it placed the defendant in the attitude of making a more rigid contention than was necessary to defeat the plaintiff's action.

2-4. The court also charged that, if the engine set out the fire which burned the property of the plaintiff, "then the law would presume that it was negligently done, unless the company introduces evidence which shows that they did, through their agents, servants, and employees, exercise all ordinary and reasonable care and diligence, and that they had their engine properly equipped with the most modern and best known appliances for the prevention of the setting out of fire," etc. The law declares that a railroad company shall be liable for any damage done to persons or property by the running of its locomotives, cars, or other machinery, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company. Civ. Code, 1895, § 2321. This statute has been held to apply to cases of fire set out by the running of an engine. When it has been shown that the operation of the engine set out the fire, a presumption arises against the company that it or its agents were guilty of the acts of negligence charged in the petition and connected with the injury; and the burden is shifted to it to show

the exercise of all ordinary and reasonable care and diligence in respect thereto. Talmadge *v.* Central of Ga. Ry. Co., 125 Ga. 400, 54 S. E. 128. The plaintiff cannot recover except upon the acts of negligence set out in the petition. Georgia Brewing Association *v.* Henderson, 117 Ga. 480, 43 S. E. 698; Hudgins *v.* Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974; Western & Atlantic Railroad Co. *v.* Branan, 123 Ga. 692, 51 S. E. 650; Augusta Ry. & Elec. Co. *v.* Weekly, 124 Ga. 384, 52 S. E. 444. And it has been held that the presumption which arises against a railroad company, upon proof of damage to property by the operation of its engine, is that it was guilty of the acts of negligence alleged in the petition. Cen. of Ga. Ry. Co. *v.* Weathers, 120 Ga. 475, 479, 47 S. E. 956; Ga. Ry. & Elec. Co. *v.* Reeves, 123 Ga. 698 (8), 51 S. E. 610. In the absence of a request for more specific instructions on this subject, the charge in general terms as to a presumption of negligence arising from proof of damage by fire from the engine, taken in connection with the entire charge, would not require a new trial. Cen. of Ga. Ry. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780. If the presumption arises, it must be rebutted by evidence; but this may be done by evidence drawn from the plaintiff or his witnesses, as well as by that introduced by the defendant. In East Tenn. Ry. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828, it was held that, upon proof that the plaintiff's property was burned by a fire resulting from the emission of sparks by one of the defendants' locomotives whilst running on the road, a presumption of negligence arose, and the burden was on the company to show the exercise of all ordinary and reasonable care and diligence, and that "such care and diligence would include keeping the locomotive in proper condition to be run with ordinary safety, as well as properly managing and operating it whilst the running was in progress at the time and place in question." In Gainesville R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213, Mr. Justice Little in the opinion said that, after proof of damage from sparks from a running locomotive and the raising of the presumption of negligence, the burden was on the company to show that the emission of such sparks, or the escape of the fire from the engine, "was not due to the want of ordinary diligence on the part of itself or its servants, either as to the condition of the locomotive or in its management or operation." See, also, Sou. Ry. Co. *v.* Williams, 113 Ga. 335, 38 S. E. 744. In the case at bar there was involved an additional allegation in regard to whether the defendant had been negligent in allowing grass, weeds, and rotten wood and other combustible material to accumulate on its right of way. The rule is often stated to be that it is the duty of a railroad company, in equipping its trains, to use such appliances as are up to the standard of those in general use and reasonably adapted to the purposes for which they were intended. Alabama Midland Ry.

Co. *v.* Guilford, 119 Ga. 526 (concurred in by five justices), 46 S. E. 655; Higgins *v.* Cherokee Railroad, 73 Ga. 149 (9b); 2 Thomp. Neg. § 2253, and citations. In the last-cited authority it is said: "It may be collected from many recent holdings that the measure of diligence which the law puts upon a railroad company in this respect is to apply to its engines the best improvements in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in good order. While it has been inadvertently said that they are bound to adopt the latest improvements in general use, yet the better view is that they are not to be charged with negligence in not adopting such an appliance until it has become well known, and until its efficiency had been demonstrated by actual use. The doctrine on which many of the decisions unite cannot better be formulated than by saying that railroad companies, while not bound to use every possible precaution to prevent the escape of fire from their locomotives that the highest scientific skill may have suggested, are required, in the exercise of reasonable care, to avail themselves of the most approved practicable appliances for the purpose."

In the supplement to Thompson on Negligence, edited by Mr. Edward F. White, referring to the above quoted section, it is said: "The recent decisions support the rule that a railroad company in the operation of its locomotives is only required to use ordinary care to provide the same with appliances to prevent the escape of fire. It is not an insurer of the completeness or perfection of the devices adopted. It is not demanded that the company should equip its engines with the 'best approved' spark arrester, but merely approved appliances as are in general use." In Texas there is a statute requiring issues of fact to be submitted to the jury, and prohibited the judge from charging or commenting on the weight of the evidence. The Supreme Court of the state held that it was error to charge that it was the company's duty to equip its engines with the best approved spark arresting devices in use. Missouri Ry. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159. In Missouri Ry. Co. *v.* Hopkins (Tex. Civ. App.) 80 S. W 414, it was held that "an instruction authorizing recovery if the locomotive setting out a fire was not equipped with the most approved spark arrester in use is erroneous; the duty of the railroad company being only to exercise ordinary care in the selection of spark arresters." See, also, Missouri Ry. Co. *v.* Jordan (Tex. Civ. App.) 82 S. W. 791; Anderson *v.* Oregon R. Co., 45 Or. 211, 77 Pac. 119; Frankfort, etc., Turnpike *v.* Philadelphia, etc., R. Co., 54 Pa. 345, 93 Am. Dec. 708; Hoye *v.* Chicago, etc., Ry. Co., 46 Minn. 269, 48 N. W. 1117, 1118. In Lesser Cotton Co. *v.* St. Louis Ry. Co., 114 Fed. 133, 52 C. C. A. 95, it was said that "it is the duty of a railway company to exercise reasonable care to provide itself with the most effective

mechanical contrivances in known practical use to prevent the escape of sparks and coal from its engines; but the law does not impose upon it the duty to absolutely provide such contrivances, or make it the insurer of their completeness or perfection." In many of the decisions which state generally that the company must furnish appliances of a certain kind, the question discussed was whether certain evidence authorized a recovery. The form of the charge was not considered. In some states the presiding judge is not prevented from expressing an opinion on the facts, or stating what, in his opinion, would constitute negligence, even when there is no violation of a statute or ordinance. Here he is prevented from so doing by a statute which is so stringent that it has come to be known among the members of the legal profession as the "dumb act." Civ. Code 1895, § 4334; Atlanta & West Point R. Co. *v.* Hudson, 123 Ga. 108, 51 S. E. 29, and cases there cited. Under our statute, if the evidence has raised a presumption of negligence, it may be rebutted by showing the use of all ordinary and reasonable care and diligence. This rule, requiring the use of ordinary care and diligence, applies to the equipping of the engine with proper appliances to prevent fire, as well as to keeping them in proper repair and to the operation of the engine, and also as to the condition of the right of way. A railroad company is bound to use all ordinary and reasonable care and diligence "to apply to its engines the best improvements in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in order." The charge complained of in effect required the defendant to rebut the presumption against it by proving both the use of all ordinary and reasonable care and diligence, and also that it equipped its engines "with the most modern and best known appliances." This was too stringent.

9. The court charged substantially that actual possession of one claiming as owner would furnish a basis for recovery in favor of the possessor against a wrongdoer, and that, if the company was liable, "the plaintiff would be entitled to recover such damages as he sustained by reason of the burning of those houses and the burning of that 315 panels of fence, and the cross-ties that he cut and had there upon his land." Actual possession, under claim of ownership, is prima facie evidence of title, and is sufficient, in the absence of anything appearing to the contrary, to authorize a recovery against a wrongdoer for damages to the property. If there is nothing to show that the title or interest of the possessor is less than a freehold, he may recover for damages to the freehold. The contention is that the possessor might be a mere tenant or lessee or owner of an estate less than the fee, and that he should not be allowed to recover except for the injury to his possession. But, in the absence of anything to the contrary,

his possession is apparently that of the owner in fee, and would sustain a recovery as such. Southern Ry. Co. *v.* Horine, 121 Ga. 386, 49 S. E. 285. The language of the charge as to "those houses, the burning of that 315 panels of fence and the crossties he cut and had there on his land," is near to, if not actually, an intimation on the facts. As to the measure of damages in that part of the case relating to the loss of standing timber, see Southern Ry. Co. *v.* Herrington, 128 Ga.—, 57 S. E. 694.

5. The other grounds of the motion do not require a new trial.

Judgment reversed. All the Justices concur.

ROGERS *et al. v.* RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah, July 12, 1907.)

[90 Pac. Rep. 1075.]

Railroads—Injuries to Pedestrians at Crossings—Negligence.*—A prima facie case of negligence in an action against a railway company for injuries to a traveler at a railway crossing is not established by proof of failure to give the statutory signals, but the evidence must show that such failure was the proximate cause of the injury.

Same—Contributory Negligence.†—Contributory negligence of a traveler injured by a train at a railway crossing prevents a recovery, though a prima facie right to recover because of the negligence of the company is shown.

Same.‡—In an action against a railway company for the death of a traveler at a railway crossing, the presumption that the traveler exercised due care prevails in the absence of evidence to the contrary.

*For the authorities in this series on the question whether it is negligence per se to fail to give crossing signals, see foot-notes appended to Bamberg *v.* Atlantic Coast Line R. Co. (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; Norris *v.* New York, etc., R. Co. (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17; foot-notes appended to Louisville & N. R. Co. *v.* Ueltshi's Ex'rs (Ky.), 21 R. R. R. 669, 44 Am. & Eng. R. Cas., N. S., 669.

†For the authorities in this series on the subject of the combined effect of negligence and contributory negligence, in actions for injuries sustained at railroad crossings, see foot-notes appended to Baker *v.* Tacoma Eastern Ry. Co. (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.

‡For the authorities in this series on the subject of the presumption of the exercise of due care by a person killed by a train or car, see foot-notes appended to Powers *v.* Pere Marquette R. Co. (Mich.), 20 R. R. R. 559, 43 Am. & Eng. R. Cas., N. S., 559; foot-notes appended to Carlson *v.* Chicago & N. W. Ry. Co. (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208.

Rogers *v.* Rio Grande Western Ry. Co

Same—Instructions.—An instruction in an action against a railway company for killing a traveler at a crossing that the presumption that the traveler used due care is destroyed, where it appears that if he had looked and listened before driving on the crossing he would have seen or heard the train approaching, is, when considered in connection with another instruction, that every person is presumed to be in the exercise of due care, a correct statement of the law on the subject of presumptions.

Same.§—Where, in an action against a railway company for killing a traveler at a crossing, the evidence showed that if the traveler had looked and listened he could have heard and seen the approaching train, an instruction that the presumption that the traveler used due care was destroyed, where it appeared that if he had looked and listened he would have seen or heard the train, properly stated when the presumption of due care ceased to be operative.

Trial—Instructions—Invading Province of Jury.—An instruction, in an action against a railway company for killing a traveler at a railway crossing, that the presumption that the traveler used due care to avoid injury is destroyed, where it appears that if he had looked and listened he would have seen or heard the train approaching, does not invade the province of the jury, but leaves them to say whether or not the presumption was overcome.

Same—Construction of Charge as a Whole.—Where, in an action against a railway company for killing a traveler at a railway crossing, the court in one charge correctly defined the reciprocal duties of the traveler and the railway company, another charge that the employees of the company had the right to believe that the traveler would look and listen while approaching to cross the track was not erroneous for failing to define the duties of the employees in charge of the train.

Same.—Where the instructions construed together correctly state the law as applicable to the evidence, a party cannot single out a phrase or sentence from the instruction and base an error thereon.

Same—Applicability to Facts.—Where, in an action against a railway company for the death of a traveler at a railway crossing, there was evidence of the effect of a headlight on a person approaching a crossing, but there was no evidence of the effect, if any, the headlight had on the traveler, or any evidence that he saw the headlight, an instruction that the jury might take into consideration on the question of contributory negligence testimony relating to the traveler being blinded, or dazzled, or deceived by the light from the head-

§For the authorities in this series on the subject of the sufficiency of evidence to rebut the presumption of due care on the part of a person killed by a train or car, see foot-notes appended to Porter *v.* Missouri Pac. Ry. Co. (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 342; foot-notes appended to Wilson *v.* Lake Shore, etc., Ry. Co. (Mich.), 21 R. R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356.

light of the engine relating to the speed of the train was properly refused, because of the absence of evidence on which to base it.

Death—Actions for Causing Death—Damages—Statutes.—Under Rev. St. 1898, § 2912, providing that the damages recoverable in an action for wrongful death shall be such as under all the circumstances of the case may be just, the damages in an action by parents for the negligent death of an adult child are not limited to the probable contributions of money which the parents would have received during the child's lifetime, but may also consist of the elements entering into the domestic relations of parent and child, living in one family, or otherwise.

Appeal—Harmless Error—Instructions.—Where, in an action against a railway company for the death of a traveler at a railway crossing, there was evidence authorizing substantial damages under the instructions of the court if the company was liable, and the jury found under the evidence in favor of the company, the refusal to charge that if the jury found for plaintiff they might take into consideration the probable value of the life of the traveler as judged from his earning capacity and from the number of the years he was expected to live was not prejudicial.

Same—Questions Reviewable—Immaterial Questions.—Where the jury rendered a verdict supported by the evidence, necessitating affirmance, the question urged by respondent whether the court should not have directed a verdict in favor of the successful party was immaterial.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by C. D. Rogers and another against the Rio Grande Western Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. R. White and *Powers & Marioneaux,* for appellants.
Van Cott and *Allison & Riter,* for respondent.

FRICK, J. The plaintiffs (appellants here) and parents of one Lawrence E. Rogers, brought this action against the defendant (respondent in this court) to recover damages alleged to have been sustained by appellants by reason of the death of their son Lawrence, alleged to have been caused through the negligence of respondent. The facts, briefly stated, are as follows:- On May 29, 1905, at about 4 o'clock a. m. while driving on a public highway, and in crossing, or attempting to cross, the railroad track of respondent with his horse and buggy, Lawrence E. Rogers was struck by a freight train and killed. The crossing was in the open country, outside of the limits of any town or village. There were no eyewitnesses, except the engineer and fireman on the engine of the freight train, and they testified that

they saw him just before or about the time of the collision. The direct cause of the accident was left a matter of inference from the evidence. Rogers was on his way home from a farmhouse about nine miles distant from his own home and about five miles westerly from the crossing in question, at which place he had spent the night with a young lady, who, the evidence discloses, was his fiancee. He had worked all the day before the accident, and had driven over to the young lady's home after dark the evening preceding. The morning was somewhat cloudy, and the accident occurred just a little before or at the break of day. The testimony with respect to the speed of the train, the sounding of the whistle, and the ringing of the bell at and before the crossing was reached by the train, was conflicting; appellants' witnesses testifying that the statutory signals were not heard by them, and respondent's witnesses testifying that they were given. The same conflict exists as regards the speed of the train; appellants' witnesses contending that the train ran 40 or 45 miles an hour, while respondent's witnesses gave the speed as 30 miles an hour. The evidence further disclosed without conflict that the headlight on the engine was burning; that Rodgers could have seen the train a mile or more as it approached the crossing when he was at a point 285 feet from the track, and could do so continuously until he reached the crossing; that he drove a gentle horse, and was riding in a top buggy. Upon substantially the foregoing facts with regard to the accident, the court submitted the case to a jury, who returned a verdict for the respondent, upon which the court rendered judgment. The errors alleged, with one or two exceptions, relate to the instructions, and such as are argued in the brief we will now consider.

The first alleged error relates to the giving of instruction No. 14, which is as follows: "If you believe that the decedent was killed by the defendant railway company, and that such company did not give any signal for the crossing where the decedent was killed, and if you further believe from the evidence that there is no other evidence in the case which shows how the decedent met his death, then you are charged that the plaintiffs have not established that the proximate cause of the decedent's death was the alleged failure of the defendant to give crossing signals, and in that event your verdict should be for the defendant." As we understand counsel's argument, they contend that the vice of the instruction consists in telling the jury that the mere failure to sound the whistle or ring the bell, standing alone, was not sufficient to authorize a recovery. Counsel argue that the failure to give the statutory signals constitutes negligence per se, and therefore respondent's negligence was established, and this being so, the necessary proof entitling appellants to recover existed and could be defeated only by proof of contributory negligence. It may be conceded that the failure to comply with the statute

with regard to warning signals generally constitutes negligence per se, as was held by this court in Smith *v.* Min. & S. S. Co. (Utah) 88 Pac. 683, but proof of negligence without more, however, is not enough. In addition to this the party upon whom rests the burden of proof must show by some competent evidence that the negligence proved was the proximate cause of the injury complained of, or, where there is more than one cause, that it at least was one of the causes. A *prima facie* case is not established until this is done, and hence the existence or nonexistence of contributory negligence, under such circumstances, is immaterial. Contributory negligence, if established, prevents a recovery, although otherwise a complete *prima facie* right to recover is shown. The instruction did no more than to tell the jury that, although respondent may have been guilty of negligence, unless it appeared from the evidence that such negligence was the proximate cause of the injury, a recovery was not authorized upon proof of negligence alone. The instruction, therefore, is not open to the criticism made by counsel, which is clearly demonstrated by the following authorities: 1 Thompson on Negligence, § 45; 8 A. & E. Enc. Law (2d Ed.) 416; Byrd *v.* Express Co., 51 S. E. 857, 139 N. C. 273; Kearns *v.* Southern Ry. Co., 52 S. E. 131, 139 N. C. 470; 44 A. & E. Ry. Cases, 484.

It is further contended that the court erred in giving instruction No. 15, which is as follows: "The presumption that the decedent used due care in approaching the crossing in question in order to avoid injury is entirely destroyed, where it appears from the evidence that if he had looked and listened before driving upon the crossing in question he must have seen or heard the train approaching." It is urged that the court, by this instruction, invaded the province of the jury; that it is misleading; and that is not a correct statement of the law. In order to give the instruction its proper effect, it must be construed in connection with other instructions given, and especially in connection with paragraph 10 of the instructions. In that paragraph the court lays down the correct rule applicable to contributory negligence in attempting to cross railroad tracks, and in that regard tells the jury that, as matter of law, every person is presumed to be in the exercise of due care for his own safety. Instruction No. 15, therefore, in its effect, was no more than a statement that the presumption of the exercise of due care could not prevail if it was made to appear from the evidence that due care had not been exercised. In other words, in the absence of all evidence that presumption prevailed, but that it could not prevail against evidence showing a want of proper care. If instruction No. 15 had been made a part of instruction No. 10, of which, in its effect, it is a part, we think no one would seriously contend that it is subject to criticism as a statement of the law upon the subject of presumptions. Moreover there was some evidence respecting

deceased's opportunity to see and observe the approaching train. The surrounding country was such that if he had looked and listened, as appears from the evidence, he could have both heard and seen the approaching train which caused the accident. If it was proper, therefore, to tell the jury—and it certainly was—that a person approaching a railroad crossing will be presumed to be in the exercise of due care, it was equally proper to tell them in what way and when this presumption might cease to be operative. The presumption is by no means a conclusive one, but is at most evidentiary, and its legal effect in one sense amounts only to a statement, in another form, that negligence is never presumed as matter of law. Nor did the court in any way invade the province of the jury in the instruction, but it left it for them to say whether the presumption was overcome or not. The following, among numerous other cases that might be cited, we think clearly illustrate that the court, in submitting the case to the jury upon the evidence, gave the appellants all that they were entitled to under the law: Stopp *v.* Fitchburg R. Co., 29 N. Y. Supp. 1008, 80 Hun, 178; Hook *v.* Mo. P. Ry. Co., 63 S. W. 360, 162 Mo. 569.

Objection is also made to instruction No. 16, for the reason, it is asserted, that the court told the jury that the servants of respondent "had the right to believe that the deceased would look and listen" while approaching or attempting to cross the railroad track, without defining the duties of those in charge of the train with regad to railroad crossings. Here again the court's instruction No. 16½, immediately following No. 16, and which is, in effect, a part thereof, in almost the precise language counsel now contend for, told the jury what were the reciprocal duties of the traveler on the highway and the railroad company applicable to railroad crossings. The court thus did just what counsel insist it should have done, namely, define the rights and duties of both with regard to railroad crossings. The mere fact that the duty with regard to the traveler was stated in one instruction, and the duty of the company in another, certainly cannot, for that reason, constitute error.

There are other objections to instructions, but in every instance the weak point of counsel's objection lies in the fact that they single out a phrase or sentence from the instruction and base error upon that. This is neither a fair, nor a proper, test. In some instances a phrase or sentence may be such a clear misstatement of the law, or an assumption of fact thereby invading the province of the jury, as to require a reversal of the case. But nothing of that kind appears in the instruction criticised, and when all are read and construed together, the law, as applicable to the evidence in the case, seems to have been fully and fairly stated by the court, and the jury could not have been misled by anything the court said or omitted to say.

Appellants further assert that the court erred in refusing to

give the following request: "The jury may take into consideration on the question of contributory negligence any testimony relating to the deceased being blinded or dazzled or deceived by the light from the headlight of the engine relating to the speed of the train." The difficulty with this request is that there was no evidence upon which to base it. True, there was some evidence admitted on behalf of appellants to show the effect of a headlight upon a person approaching a crossing. But the question in the case was not whether or not a headlight affected persons generally, but what, if any, effect this particular headlight had on the deceased. There is an absolute want of evidence that the deceased saw the headlight at all. If he did not see it, then it could not have affected him. Whether he did or did not is mere conjecture. It would be as legitimate to assume that the deceased was asleep in his buggy and thus was oblivious to all his surroundings. This, of course, would be a mere conjecture, but it affords an illustration that one may conjecture one way as readily as another. The court gave the jury the whole law upon deceased's conduct when it instructed them that he was presumed to have exercised due care for his own safety. This presumption is well founded, because it is based upon that universal experience that all rational beings, both from instinct and their own experience, avoid serious danger to themselves. The request, therefore, was based upon the assumption that the deceased saw the headlight, and that he was "dazzled and deceived" by it. It is a mere guess as to whether a certain individual at a certain time and place, and under certain circumstances, will, or will not, observe a certain thing and be affected thereby. The court therefore did not err in refusing to give an instruction to the jury based wholly upon the presumption of a fact from which the jury could only conjecture the result.

Error is also predicated on the refusal of the court to give the following request: "If the jury find for the plaintiffs, then they may take into consideration the probable value of the life of the plaintiff (meaning deceased) as judged from his earning capacity and from the number of years he was expected to live. His earning capacity is regarded in the nature of an asset." To appreciate the purpose of the request, it is necessary to state that it was offered with a view of overcoming the effect of certain evidence that was admitted on behalf of respondent in mitigation of damages, which evidence was to the effect that the deceased was engaged and was about to be married to the young lady at whose home he spent the night preceding his death. The evidence was admitted over the objection of appellants, and its admission is also urged as error. The court in another instruction charged the jury with regard to the damages to be allowed the appellants, limiting the recovery to such an amount as the deceased would probably have contributed to them from his earnings in view of all the evidence. No exception was taken to this instruction, but

it is urged that the measure of recovery was not what the deceased would probably have contributed merely, but that it was the probable value of deceased's life. In this connection it is urged that in view of the evidence that the deceased was about to be married the jury might infer that he, after he married, would devote his earnings to his wife and prospective family, and hence the jury would assume that appellants would receive little or nothing from the deceased, and thus they may have found against appellants on the ground alone that appellants sustained no appreciable damages. It is contended that if this evidence had not been admitted the jury might have found in favor of appellants upon the facts. We think the contention of appellants cannot be sustained. The measure of damages in a case like the one at bar is not the pecuniary value of deceased's life, but what was the pecuniary loss suffered by appellants by reason of his death. Under section 2912, Rev. St. 1898, the damages recoverable in a case like the one at bar are such as "under all the circumstances of the case may be just." The amount that is recovered is not intended as an asset of the estate merely, but it belongs to those who have suffered or will suffer some direct pecuniary loss by reason of the death. The right of action is given for the benefit of certain persons only, and the amount of recovery is dependent upon the circumstances of each case, the relationship of the parties to the deceased, and in the case of the death of an adult child the recovery is limited to the probable benefits the parents would have received during his lifetime from the deceased child. Such benefits are, however, not to be limited in all cases to mere contributions of money, but may consist of the various elements that enter into the domestic relations of parent and child, living in one family, or otherwise. In such cases the aim of the law is to repair in a pecuniary way the loss sustained by the parent. Under the evidence in this case the appellants would have been entitled to recover some substantial damages both under the law and the instructions of the court, if respondent was liable at all in the action. The jury therefore must have found, as they were justified in finding, that the respondent was not guilty of culpable negligence, or, if it was, that the deceased directly contributed to the accident by his own negligence, or, further, that the real or direct cause of the accident was not established by the evidence. All of these matters were submitted to the jury for determination, and their findings, in view that here is no prejudicial error in the instructions, are conclusive.

We need not discuss the question urged by respondent that in any event appellants cannot complain because the court should have directed a verdict against them as matter of law. Whether this should or should not have been done, in view of the conclusions reached, is an immaterial inquiry.

The judgment is affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

GEHRING *v.* ATLANTIC CITY R. CO.

(Court of Errors and Appeals of New Jersey, Nov. 27, 1907.)

[68 Atl. Rep. 61.]

Railroads—Accidents at Crossings—Contributory Negligence—Failure to Look or Listen for Approaching Trains.*—The duty of a traveler upon a highway before crossing a railroad to look up and down the tracks and listen for approaching trains must be performed at a time when its performance will be an efficient means of warning the traveler of his peril, if peril exists, and his failure to perform such duty is such negligence as will prevent a recovery if he is run down at the crossing, even though it be shown that no warning of the approach of the train was given.

Same.—In an action for injuries in being struck by a train while crossing a railroad, evidence examined, and held sufficient to show such negligence on the part of plaintiff as to justify the direction of a verdict against him.

Same—Care Required of Children.†—A boy 13 years of age is old enough to appreciate fully the dangerous character of a railroad crossing, and the necessity of using care for his own safety while crossing it; and therefore the rules which prevail as to adults in such cases are equally applicable to him.

Garrison, J., dissenting.

Error to Supreme Court.

Action by George G. Gehring, by next friend, against the Atlantic City Railroad Company. From an order directing a verdict and a judgment for defendant, plaintiff appeals. Affirmed.

William I. Garrison and *J. J. Crandall,* for plaintiff in error. *Clarence L. Cole,* for defendant in error.

GUMMERE, C. J. The single assignment of error in this case presents the question whether the trial court properly directed a verdict for the defendant railroad company.

*See extensive note, 11 R. R. R. 154, 34 Am. & Eng. R. Cas., N. S., 154; Carlson *v.* Chicago & N. W. Ry. Co. (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208; foot-notes appended to Green *v.* Missouri Pac. Ry. Co. (Mo.), 18 R. R. R. 793, 18 Am. & Eng. R. Cas., N. S., 793.

†For the authorities in this series on the subject of the degree of care required of children for their own protection, see foot-notes appended to Duggan *v.* Boston & M. R. R. (N. H.), 24 R. R. R. 797, 47 Am. & Eng. R. Cas., N. S., 797; foot-notes appended to Illinois Cent. R. Co. *v.* Johnson (Ill.), 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; foot-notes appended to Van Salvellergh *v.* Green Bay Traction Co. (Wis.), 23 R. R. R. 330, 46 Am. & Eng. R. Cas., N. S., 330.

The suit is brought to recover compensation for injuries received by the plaintiff through being struck down at a highway crossing by one of the defendant company's trains. The case made by the proofs submitted on behalf of the plaintiff, and supplemented by the undisputed testimony of the defendant, was as follows: Plaintiff, a boy about 13 years old, left his home on his bicycle about a half hour before sunset to go to the post office at Brigantine Beach. The highway upon which he traveled crossed the tracks of the defendant company at right angles at a point about 100 yards from his home. The planks at the crossing had been removed, leaving the stone ballast of the railroad exposed, thereby making the surface of the highway very rough. Three tracks had been laid at this point. The first one—as the crossing was reached from the direction in which the plaintiff was traveling—was a siding. The next was the south-bound track leading from Camden to Atlantic City. The third was the north-bound track between the same points. Upon the siding, in close proximity to the crossing, there were two freight cars standing. Whether they were both of them south of the crossing, or one of them on each side of the crossing, is left uncertain by the testimony. The distance from the easterly rail of the siding to the westerly rail of the north-bound track was 20 feet and 5 inches. The plaintiff, after passing over the siding, and clearing the overhang of the freight cars, stopped and looked for approaching trains. He then had an unobstructed view along the track both north and south for considerably more than a mile. He neither heard nor saw any train approaching, and went on over the crossing. When he reached the north-bound track, his wheel became caught in the stone ballasting between the rails, and was brought very nearly, or entirely, to a standstill. (The plaintiff himself testified both ways upon this point. In answer to a question by his counsel he testified that the wheel was held straight up by the stones, but could not move, and continued in this position from one to two minutes. Subsequently, in answer to a question by the court whether he intended to state that the bicycle came to an absolute stop, he replied, "No.") While still upon the track with his wheel, he was run down by a north-bound train of the defendant company on its way to Camden, which approached the crossing without any warning being given either by ringing of the bell or the blowing of a whistle.

On these facts does it conclusively appear that the plaintiff's accident was partly due to his own negligence? It is so thoroughly settled by the repeated decisions of this court that it is the duty of the traveler upon a highway before crossing a railroad to look up and down the tracks, and also listen for approaching trains, and that his failure to do so is such negligence as will prevent a recovery if he is run down at the crossing, even if it be shown that no warning of the approach of the train was given by

those operating it, that a citation of the cases is unnecessary. That the duty referred to must be performed at a time when its performance will be an efficient means of warning the traveler of peril, if peril exists, has also been frequently declared by this court. Merkle *v.* New York, Lake Erie, etc., R. R. Co., 49 N. J. Law, 473, 9 Atl. 680; West Jersey R. R. Co. *v.* Ewan, 55 N. J. Law, 674, 27 Atl. 1064; Central R. R. Co. *v.* Smalley, 61 N. J. Law, 277, 39 Atl. 695; Swanson *v.* Central R. R. Co., 63 N J. Law, 605, 44 Atl. 852. The plaintiff made his only observation immediately after crossing over the siding. He had then an unobstructed view of over a mile in the direction from which the train was approaching. His failure to see it was necessarily due either to the fact that the train was not yet in sight, or to his looking so carelessly as not to perceive what was plainly within his view. If the latter was the reason for his ignorance of the approach of the train, the direction of a verdict for the defendant was clearly right, for his failure to observe it places him in the same position, so far as the question of his negligence is concerned, as if he had perceived it, and had then attempted to cross over the track in front of it. If his failure to detect the approach of the train was due to the fact that it was not yet within the range of his vision when he made his observation, then the accident was the result of his riding over the space intervening between the siding and the north-bound track, and then remaining upon the track without again looking or listening, until he was run down, during which period the train traveled a distance of considerably more than a mile. His failure in this regard was a neglect to perform the duty of looking and listening at a time when such performance would have been efficacious in informing him of the approaching danger, and justified the direction of a verdict against him.

The fact that the plaintiff was a boy of 13 years did not relieve him from the duty of careful observation. He was old enough to appreciate fully the dangerous character of a railroad crossing, and the necessity of using care for his own safety while riding over it; and the rules which prevail as to adults in cases of this kind are equally applicable to him. Sheets *v.* Connolly Ry. Co., 54 N. J. Law, 518, 24 Atl. 483; North Hudson Ry. Co. *v.* Flanagan, 57 N. J. Law, 696, 32 Atl. 216; Brady *v.* Consolidated Trac. Co., 64 N. J. Law, 373, 45 Atl. 805; Barlow *v.* Jersey City, etc., Ry. Co., 67 N. J. Law, 365, 51 Atl. 463.

We find no error in the judicial instruction complained of, and the judgment under review must be affirmed.

STATE ex rel. ELLIS, Atty. Gen., *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, March 19, 1907.)

[44 So. Rep. 223.]

Mandamus—Railroads—Maintenance of Roadbed.*—While the courts, on a proper case made, will by mandamus require a railroad company to put and maintain its roadbed and track in a condition that renders them reasonably safe and adequate for the public purposes and uses to which they are devoted, yet the character, quality, and quantity of the materials and appliances to be used will be left to the proper discretion of the railroad company.

Same—Pleadings—Allegations of Writ.—Where an alternative writ of mandamus, brought to compel a railroad company to put and maintain the roadbed and track on its main lines in a safe and suitable condition for the public service required of it, states by definitely named termini the location of the several parts of the main lines of the respondent's railroad, and alleges "that said roadbed has an uneven and irregular surface, a large percentage of the cross-ties under the rails are rotten and wholly incapable of supporting the rails with the weight of one empty car thereon, at divers places along the said main lines of railroad and for great distances the iron spikes which are driven into the cross-ties to support the rails can be lifted from the cross-ties with the naked hand, that many of the angle bars or plates on the main lines and bolts used in the same are broken, and that in many places the angle plates are not fastened with the requisite number of bolts," such allegations, if true, show the main line of the road as a whole to be in an unfit and unsuitable condition for rendering the public service in which it is used, and are sufficient to be answered, since the duty is a general one, due to the public, and the breaches complained of are peculiarly within the knowledge of the respondent railroad company.

Same—Extent of Writ.*—A railroad company has a proper discre-

*For the authorities in this series on the subject of the issue of the writ of mandamus to compel railroads to perform duties, see note, 12 Am. & Eng. R. Cas., N. S., 860 (construction of bridge); note, 6 Am. & Eng. R. Cas., N. S., 258 (increasing number of trains); note, 6 Am. & Eng. R. Cas., N. S., 667 (to compel construction and operation of railroad); note, 11 Am. & Eng. R. Cas., N. S., 75 (at instance of private citizen to compel operation of railroad); note, 14 Am. & Eng. R. Cas., N. S., 472 (to compel erection of depot); note, 13 Am. & Eng. R. Cas., N. S., 84 (to compel carrier to receive and carry freight or passengers); note, 6 Am. & Eng. R. Cas., N. S., 258 (duty to stop trains at stations); note, 12 Am. & Eng. R. Cas., N. S., 242 (duty to operate mixed trains, etc.); State *v.* Harrington (Neb.), 22 R. R. R. 835, 45 Am. & Eng. R. Cas., N. S., 835 (court has no power to issue peremptory writ, without notice, in action to compel railroad to furnish cars to shipper at a certan time and place); Mystic

tion in the performance of its duty to the public, even when done in good faith under the command of judicial process. Therefore, while mandamus will issue in a proper case to compel a railroad company to put and maintain its roadbed and track in a safe and suitable condition to meet the requirements of the public service, the court will not ordinarily by mandamus command the use of materials and appliances of stated character, number, and dimensions, since such matters are within the discretion of the railroad company properly exercised.

Same.—Allegations of an alternative writ of mandamus, which are relevant to the issues and not otherwise improper, will not be stricken on motion.

(Syllabus by the Court.)

In Banc. Application by the state, on the relation of W. H. Ellis, Attorney General, for writ of mandamus to the Atlantic Coast Line Railroad Company. Motion to quash writ granted on condition.

Within the time allowed by the court by its order made February 20, 1907, the Attorney General presented the following alternative writ on February 27, 1907:

Milling Co. *v.* Chicago, etc., Ry. Co. (Iowa), 21 R. R. R. 124, 44 Am. & Eng. R. Cas., N. S., 124 (to compel railroad to switch cars on to private track); State *v.* Atlantic Coast Line R. Co. (Fla.), 20 R. R. R. 710, 43 Am. & Eng. R. Cas., N. S., 710 (to compel railroad to deliver wires, etc., between stations, for another telegraph company); footnotes appended to Southern Express Co. *v.* R. M. Rose Co., 18 R. R. R. 565, 41 Am. & Eng. R. Cas., N. S., 565 (duty to receive and carry freight); Railroad Comm'r *v.* Atlantic Coast Line R. Co. (S. Car.), 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505 (to enforce decree of Railroad Commission); United States *v.* Lake Shore, etc., Ry. Co. (U. S.), 16 R. R. R. 93, 39 Am. & Eng. R. Cas., N. S., 93 (jurisdiction, in federal circuit court, of original proceedings by mandamus to compel carrier to make report which Interstate Commerce Commission is authorized to require); State *v.* Atlantic Coast Line R. Co. (Fla.), 15 R. R. R. 286, 38 Am. & Eng. R. Cas., N. S., 286 (to enforce freight rates fixed by Railroad Commission); Yazoo & M. V. R. Co. *v.* Searles (Miss.), 14 R. R. R. 465, 37 Am. & Eng. R. Cas., N. S., 465 (to compel railroad to reduce its tracks to grade at certain crossing); State *v.* Seaboard Air Line Ry. (Fla.), 13 R. R. R. 266, 36 Am. & Eng. R. Cas., N. S., 266 (to compel company to put into effect rates fixed by Railroad Commission); State *v.* Board of Com'rs (Ind.), 8 R. R. R. 938, 31 Am. & Eng. R. Cas., N. S., 938 (to compel collection of railroad aid tax); Loraine *v.* Pittsburg, etc., R. Co. (Pa.), 9 R. R. R. 306, 32 Am. & Eng. R. Cas., N. S., 306 (to compel carrier to furnish cars); United States *v.* Norfolk & W. Ry. Co. (W. Va.), 3 R. R. R. 19, 26 Am. & Eng. R. Cas., N. S., 19 (to prevent discrimination in furnishing cars to transport interstate traffic); Chicago & A. R. Co. *v.* Kuckkuck (Ill.), 5 R. R. R. 91, 28 Am. & Eng. R. Cas., N. S., 91 (to compel operation of trains); People *v.* Brooklyn Heights R. Co., 5 R. R. R. 95, 28 Am. & Eng. R. Cas., N. S., 95 (to enforce determination of Railroad Commission as to proper operation of railroad); Williams *v.* New York, etc., R. Co. (Conn.), 12 Am. & Eng. R. Cas., N. S., 860 (to compel con-

"The State of Florida to the Atlantic Coast Line Railroad Company:

"Permission of the court being first had and obtained upon application of the relator in the above-stated cause, it was ordered that the alternative writ hereinbefore issued herein be, and the same is, hereby amended so as to read as follows:

"Whereas, by a petition filed in this court in the name of the state of Florida, upon the relation of W. H. Ellis, as Attorney General of said state, it has been made to appear:

"(1) That the Atlantic Coast Line Railroad Company is a railroad corporation, doing business under the laws of the state of Florida, in said state, and is in possession of, controls, and pretends to operate certain lines of railroad lying wholly in the state of Florida, to wit: A line of railroad from Palatka, in Putman county, to Rochelle, in Alachua county, thence in Marion county, thence to Leesburg, in Lake county, and to Brooksville, in Hernando county, and from Croom, in Hernando county, to St. Petersburg, in Hillsborough county, and from Bartow, in Polk county, to Punta Gorda, in De Soto county; also a line of railroad from Ocala, in Marion, via Dunnellon, in said county, to Gulf Junction, in Citrus county, and from thence to Homosassa, in said county, and from Gulf Junction, in Citrus county, to Croom, in Hernando county, and from Trilby, in Pasco county, to Bartow, in Polk county.

"(2) That the line of railroad aforesaid from Palatka to

struction of bridge over street); People *v.* St. Louis, etc., R. Co. (Ill.), 12 Am. & Eng. R. Cas., N. S., 227 (to compel operation of separate passenger trains); Cumberland, etc., Co. *v.* Morgan's, etc., Co. (La.), 13 Am. & Eng. R. Cas., N. S., 71 (to compel carriage of freight); Atty. Gen. *v.* American Express Co. (Mich.), 13 Am. & Eng. R. Cas., N. S., 95 (to compel carriage of goods where shipper refuses to pay for revenue stamp, and to compel express companies to attach revenue stamps to receipts and bills of lading); State *v.* Kansas City, etc., Co. (La.), 14 Am. & Eng. R. Cas., N. S., 461 (to compel erection of depot); Cleveland, etc., Ry. Co. *v.* People (Ill.), 14 Am. & Eng. R. Cas., N. S., 846 (to compel trains to stop at county seats); State *v.* Jacksonville Term. Co. (Fla.), 16 Am. & Eng. R. Cas., N. S., 727 (to enforce order of Railroad Commission); Sherwood *v.* Atlantic & D. R. Co. (Va.), 6 Am. & Eng. R. Cas., N. S., 670 (maintenance of terminals); City of Lansing *v.* Lansing, etc., Ry. Co. (Mich.), 5 Am. & Eng. R. Cas., N. S., 719 (to compel street railway to pave); State *v.* Spokane St. Ry. Co. (Wash.), 11 Am. & Eng. R. Cas., N. S., 62 (mandamus will lie at instance of abutting owner to compel street railway to operate its line); People *v.* Northern Cent. Ry. Co. (N. Y.), 21 Am. & Eng. R. Cas., N. S., 192 (parties in mandamus proceedings to compel lessee of railroad to remove obstruction from street); People *v.* New York Cent., etc., R. Co. (N. Y.), 23 Am. & Eng. R. Cas., N. S., 175 (sufficiency of allegation in petition for writ of mandamus); People *v.* St. Louis, etc., R. Co. (Ill.), 6 Am. & Eng. R. Cas., N. S., 241 (whether a railroad company may be forced to operate a passenger, instead of a mixed train by mandamus).

Rochelle, thence to Ocala, thence to Leesburg and Brooksville, and from Bartow to Punta Gorda, was constructed and built under and by virtue of a charter granted by the state of Florida to the Gainsville, Ocala & Charlotte Harbor Railroad Company, to which said railroad company the state of Florida by chapter 3167 of the Laws of 1879, approved March 4, 1879, granted large donations of land belonging to the state of Florida to aid in the construction of the lines of railroad of said corporation. The said raiload corporation received from the state of Florida, pursuant to said land grant, two million six hundred and twenty-two thousand three hundred and sixty-two and forty-five one-hundredths (2,622,362.45) acres of land.

"(3) That the line of railroad aforesaid, beginning at Ocala, in Marion county, and running, via Dunnellon and Gulf Junction, to Homosassa, in Citrus county, and from Gulf Junction to Inverness, in said county, was constructed and built under and by virtue of a charter granted by the state of Florida to the Silver Springs, Ocala & Gulf Railroad Company, to which said railroad company the state of Florida by chapter 3170 of the Laws of 1879, approved March 12, 1879, granted large donations of land belonging to the state of Florida to aid in the construction of the lines of railroad of said corporation. The said railroad corporation received from the state of Florida, pursuant to said land grant, three hundred and thirty-nine thousand eight hundred and seven and fourteen one-hundredths (339,807.14) acres of land.

"(4) That the line of railroad aforesaid, from Inverness, in Citrus county, to Croom, in Hernando county, and thence to Trilby, in Pasco county, and thence to Barlow, in Polk county, was constructed and built under and by virtue of a charter granted by the state of Florida to the South Florida Railroad Company, to which said railroad company the state of Florida, by chapter 3491 of the Laws of 1883, approved March 5, 1883, granted large donations of land belonging to the state of Florida to aid in the construction of the lines of railroad of said corporation. The said railroad corporation received from the state of Florida, pursuant to said land grant, sixty-five thousand one hundred and ninety-two and seven one-hundredths (65,192.07) acres of land.

"(5) That the line of railroad aforesaid, from Trilby, in Pasco county, to St. Petersburg, in Hillsborough county, was constructed and built under and by virtue of a charter granted by the state of Florida to the Orange Belt Railroad Company, to which said railroad company the state of Florida granted large donations of land belonging to the state of Florida to aid in the construction of the lines of railroad of said corporation. The said corporation received from the state of Florida, pursuant to said land grant, eighty-eight thousand six hundred and eighty-seven and ninety-two one-hundredths (88,687.92) acres of land.

"(6) That afterwards, by various purchases, transfers, mergers, and consolidation, the said Atlantic Coast Line Railroad Company acquired all the franchises, properties, and lines of railroad as hereinbefore described of said railroad companies, and came into the actual possession thereof, and is now pretending to operate said lines of railroad as a common carrier, and thereby became and was obligated to the state of Florida to maintain and operate said lines of railroad as a common carrier and faithfully to perform the public trust imposed upon and accepted by it; that is to say: The said Atlantic Coast Line Railroad Company by reason of the foregoing facts is, and since October 1, 1905, has been, obligated unto the state of Florida to accept and receive, transport and deliver, with reasonable safety and dispatch, all freight offered to it along said lines of railroad proper to be transported by common carrier in this state, and to furnish ample facilities for transporting the same in the manner aforesaid, at the reasonable tariff and charges adopted by said corporation and then in force, and to transport with reasonable safety and dispatch all passengers over said main line of railroad, and to provide reasonably safe and convenient facilities therefor, and to that end to maintain and keep its roadbed and track in a reasonably safe and suitable condition and repair; but the state of Florida, by the said W. H. Ellis, as Attorney General of said state, avers and informs your honors that the said Atlantic Coast Line Railroad Company, through its officers, agents, employees, and servants, has since the 1st day of October, A. D. 1905, failed and is now failing in the performance of its said public duty along and over the main lines of railroad as above described, and to perform the public trust conferred upon it as aforesaid, and accepted by it as above set forth, to the wrong, injury, and great inconvenience of the public; that is to say:

"(7) The said Atlantic Coast Line Railroad Company has carelessly and negligently, and in violation of its duty to the state and the public, since the 1st day of October, A. D. 1905, failed and is failing to keep and maintain its roadbed and track in good repair, and in fit and suitable condition for the proper transportation of freight and passengers over its said main lines of railroad and the safe movement of its equipment thereon; that it has allowed from the date aforesaid and is allowing its roadbed and track to run down, deteriorate, and become unfit and unsuitable for the proper movement of its equipment thereon and the transportation of freight and passengers thereover; that the said roadbed and tracks on said main line, in their present condition, are and constitute a danger and a menace to the lives and limbs of the passengers on said railroad and the freight transported thereover; that said roadbed has an uneven and irregular surface,

a large percentage of the cross-ties under the rails are rotten and wholly incapable of supporting the rails with the weight of an empty car thereon, at divers places along the said main lines of railroad and for great distances the iron spikes which are driven into the cross-ties to support the rails can be lifted from the cross-ties with the naked hand, that many of the angle bars or plates on the main lines and bolts used in the same are broken, and that in many cases the angle plates are not fastened to the rails with the requisite number of bolts, and that on account of the unsafe and dangerous and bad condition of the roadbed and track as aforesaid numerous casualties have recently occurred upon said main lines of railroad, resulting in the destruction of and injury to human life and great damage to property. The state of Florida, by W. H. Ellis, Attorney General, shows unto your honors that, in order to place the said main lines of railroad in a fit and suitable condition to enable the said Atlantic Coast Line Railroad Company to faithfully and properly perform its public trust and the duties devolving upon it as aforesaid, it is necessary that the roadbed and tracks of said main lines of railroad should be repaired, by making and constructing an even and regular surface on said roadbed, and by adding to the sound ties now upon said main lines of road a sufficient number of new, sound cross-ties of the following dimensions, to wit: nine feet long, seven inches thick, and nine inches wide, and showing a heart face of seven inches, to make two thousand six hundred and forty such cross-ties upon each and every mile of the main lines of said railroad, and that said number of such ties be maintained on each and every mile of said main lines, and by fastening the ends of the rails together with unbroken and complete joints, by joining the ends of the said rails with two angle bars and four bolts and nuts at each joint, and by fastening each rail along said main lines of railroad to the cross-ties thereunder by two standard spikes driven into each cross-tie, and by fastening each rail on said main lines to the cross-ties with two standard spikes driven into each cross-tie.

"But the said Atlantic Coast Line Railroad Company has failed since the 1st day of October, A. D. 1905, and is failing, to maintain and keep its said roadbed and track along its said main lines of railroad in suitable and fit condition for the transportation of freight and passengers thereover, by failing to make and construct and maintain an even and regular surface on its said roadbed along the main lines of said railroad, and by failing to replace the rotten cross-ties on said main lines, so as to keep and at all times maintain on its said main lines two thousand six hundred and forty cross-ties of the kind, quality, and dimensions above mentioned and described, and by failing to fasten the ends of the rails on said lines together with unbroken and complete joints, by joining the ends of the rails with two angle bars and four

bolts and nuts at each joint, and by fastening each rail on said main line to the cross-ties thereunder with two standard spikes driven into each cross-tie.

"(8) All of which failures and omissions on the part of said Atlantic Coast Line Railroad Company to perform and discharge its duties and obligations to the said state of Florida as aforesaid has resulted and is resulting in great confusion, inconvenience, hindrances, delays, and injury to the public generally in the state of Florida.

"(9) That the state of Florida, by W. H. Ellis, as Attorney General of said state, further shows unto and informs your honors that the people of the state of Florida are entirely without remedy in the premises, unless it be afforded by the interposition of this honorable court through a writ of mandamus.

"Now, therefore, we being willing that full and speedy justice be done in the premises, do command you, the Atlantic Coast Line Railroad Company, to forthwith repair and put in reasonably safe and suitable condition, and maintain the same in such condition, your roadbed and track over and along the main lines of railroad from Palatka, in Putman county, to Rochelle, in Alachua county, thence to Ocala, in Marion county, thence to Leesburg, in Lake county, and to Brooksville, in Hernando county, and from Croom, in Hernando county, to St. Petersburg, in Hillsborough county, and from Bartow, in Polk county, to Punta Gorda, in De Soto county, and from Ocala, in Marion County, via Dunnellon, in said county, to Gulf Junction, in Citrus county, and from thence to Homosassa, in said county, and from Gulf Junction, in Citrus county, to Croom, in Hernando county, and from Trilby, in Pasco county, to Barlow, in Polk county, by making, constructing, and maintaining an even and regular surface on the roadbed along the main lines of said railroads, and by adding to the sound cross-ties now on the main lines of said road a sufficient number of new, sound cross-ties of the following dimensions, to wit: nine feet long, seven inches thick, nine inches wide, showing a heart face of seven inches, to make two thousand six hundred and forty such cross-ties upon each and every mile of the main lines of said railroad, and that said number of such ties be maintained on each and every mile of the main lines of said railroad, and by fastening the ends of the said rails on said main lines of railroad together with unbroken and complete joints, by joining the ends of said rails with two angle bars and four bolts and nuts at each joint, and by fastening each rail to the cross-ties thereunder by two standard spikes driven into each cross-tie, or that you appear before the justices of our Supreme Court sitting within and for the state of Florida, at the courtroom in the city of Tallahassee, on the 29th day of January, A. D. 1907, at 10 o'clock a. m. of said day, and show cause why you refuse to do so; and have you then and there this writ.

"Witness the Honorable Thomas M. Shackleford, Chief Justice of the Supreme Court of the state of Florida, and the seal of the said court, at Tallahassee, the capital, this the 11th day of January, A. D. 1907.

"[seal.] M. H. MABRY,
"Clerk Supreme Court State of Florida."

The respondents were given until March 12th to reply thereto, upon which day the following motion to quash and motion to strike were presented and argued:

"Now comes the defendant in the above-entitled cause and moves the court to quash the amended alternative writ of mandamus issued herein on the following grounds, to wit:

"(1) The fasts alleged in the said amended alternative writ do not constitute a cause of action authorizing the relief prayed for.

"(2) The allegations of fact in said amended alternative writ contained are too vague, indefinite, and uncertain to be replied to by this respondent.

"(3) The said amended alternative writ fails to conform to the directions of this court in its order authorizing said amended writ.

"(4) Because the relator has failed in the amended writ to eliminate those matters which the court held in its decision of this case should be eliminated therefrom, and on the ground that this court has not the power to deal therewith.

"(5) Because the mandatory part of said writ does not conform to the allegations of said writ.

"(6) Because the duties required of the respondent in the construction and maintenance of its roadbed and track permit of some discretion in the manner in which the same shall be construed and maintained; whereas, the mandate of this court, if in accordonce with said amended alternative writ, does not permit of any such discretion.

"(7) Because the amended alternative writ lays down an arbitrary and inflexible standard of construction and maintenance of roadbed and track, which cannot be a subject of adjudication by the court.

"(8) Because the court is asked to fix a specific and arbitrary standard of construction and maintenance of railroad, roadbed, and track, which can only be done by legislation."

"And now comes the defendant in the above-entitled cause and moves the court to strike the following portions of the several paragraphs of the amended alternative writ of mandamus, to wit:

"(1) That portion of the second paragraph of said amended alternative to writ of mandamus beginning with the words 'to which' to the end of said paragraph.

"(2) That portion of the third paragraph of said amended alternative writ of mandamus beginning with the words 'to which

said railroad company' and ending with the last word in said paragraph.

"(4) That portion of fifth paragraph of said amended alternative writ of mandamus beginning with the words 'to which said railroad company' and ending with the last word of said paragraph.

"(5) And also that portion of the sixth paragraph of said amended alternative writ of mandamus as follows: 'That it to say: The said Atlantic Coast Line Railroad Company by reason of the foregoing facts is, and since October 1, 1905, has been, obligated unto the state of Florida to accept and receive, transport and deliver, with reasonable safety and dispatch, all freight offered to it along said lines of railroad, proper to be transported by a common carrier in this state, and to furnish facilities for transporting the same in the manner aforesaid, at a reasonable tariff and charges adopted by said corporation and then in force, and to transport with reasonable safety and dispatch all passengers over said main line of railroad, and to provide reasonably safe and convenient facilities therefor.'

"And for grounds of said motion assigns the following:

"(1) Because the said allegations above mentioned are each and every of them immaterial and irrelevant to the decision of this cause.

"(2) Because the said allegations would tend to hinder and embarrass a fair trial of the issues involved in this cause.

"(3) Because the said allegations and each and every of them should have been eliminated from said amended alternative writ of mandamus, under the decision of this court already rendered in this cause."

W. H. Ellis, Atty. Gen., pro se.

W. E. Kay, Jno. J. E. Hartridge, R. A. Burford, and *Sparkman & Carter,* for respondent.

WHITFIELD, J. (after stating the facts). In the former opinion in this cause (44 South. 213) the duty of the respondent and the right of the relator were thus defined: "The duty of providing a reasonably safe and sufficient roadbed, track, equipment, and facilities, and of maintaining and operating the property in a proper condition for rendering safe, prompt, and adequate service, and of actually rendering to the public such service without unjust discrimination, being required for the public good, and contemplated by law, and imposed upon a common carrier railroad corporation in permitting the exercise by it of the franchises and privileges of a common carrier, the performance of this duty may be enforced by mandamus in a proper case, upon the relation of the Attorney General, where no other adequate remedy is provided by law." "When a railroad company permits its roadbed and track to become and remain so

palpably unfit for use in rendering the service of a common carrier that it endangers the lives and property of the public to whom the service is extended, and the law provides no other adequate remedy, the company may by mandamus, upon proper allegations, be compelled to put and keep its roadbed and track in a condition reasonably sufficient to meet the requirements of the public service it engages to perform." "If made sufficiently definite, the mandate as to repairing the roadbed and track may be enforced in this proceeding, as there does not appear to be another adequate remedy provided by law for failure to perform such duty."

The amended alternative writ alleges the duty of the respondent to furnish ample facilities for transporting, and to receive and transport with reasonable safety and dispatch, at reasonable tariff and charges, all freight and passengers properly offered along the lines of railroad mentioned in the writ, and to that end to maintain and keep its roadbed and track in a reasonably safe and suitable condition and repair; but it avers that respondent, through its officers, agents, employees, and servants, has since October 1, 1905, failed, and is now failing, in the performance of its said duty along and over the main lines of railroad as described, and to perform the public trust conferred upon it and accepted by it, to the wrong, injury, and great inconvenience of the public—that is to say: The respondent has carelessly and negligently, and in violation of its duty to the state and the public, since October 1, 1905, failed, and is failing, to keep and maintain its roadbed and track in good repair, and in fit and suitable condition for the proper transportation of freight and passengers over its said main lines of railroad and the safe movement of its equipment thereon; that it has allowed from the date aforesaid, and is allowing, its roadbed and track to run down, deteriorate, and become unfit and unsuitable for the proper movement of equipment thereon and the transportation of freight and passengers thereover; that the said roadbed and tracks on said main lines, in their present condition, are and constitute a danger and a menace to the lives and limbs of the passengers on said railroad, and freight transported thereover; that said roadbed has an uneven and irregular surface, a large percentage of the cross-ties under the rails are rotten and wholly incapable of supporting the rails with the weight of an empty car thereon, at divers places along the said main lines of railroad, and for great distances the iron spikes which are driven into the cross-ties to support the rails can be lifted from the cross-ties with the naked hand, that many of the angle bars or plates on the main lines and bolts used in the same are broken, and that in many cases the angle plates are not fastened to the rails with the requisite number of bolts; that, on account of the unsafe and dangerous and bad condition of the roadbed and track as aforesaid, numerous casual-

ties have recently occurred upon said main lines of railroad, resulting in the destruction of and injury to human life and great damage to property; that, in order to place the said main lines of railroad in a fit and suitable condition to enable the respondent to faithfully and properly perform its public trust and the duties devolved upon it, it is necessary that the roadbed and tracks of said main lines of railroad should be repaired by making and constructing an even and regular surface on said roadbed, and by adding to the sound ties now upon said main lines of road a sufficient number of new, sound cross-ties of the following dimensions, to wit: nine feet long, seven inches thick, and nine inches wide, and showing a heart face of seven inches, to make 2,640 such cross-ties upon each and every mile of the main lines of said railroad, and that said number of such ties be maintained on each and every mile of said main lines, and by fastening the ends of the rails together with unbroken and complete joints, by joining the ends of the said rails with two angle bars and four bolts and nuts at each joint, and by fastening each rail along said main lines of railroad to the cross-ties thereunder by two standard spikes driven into each cross-tie, and by fastening each rail on said main lines to the cross-ties with two standard spikes driven into each cross-tie; but the respondent has since October 1, 1905, failed, and is failing, to maintain and keep its said roadbed and track along its said main lines of railroad in suitable and fit condition for the transportation of freight and passengers thereover, by failing to make and construct and maintain an even and regular surface on its said roadbed along the main lines of said railroad, and by failing to replace the rotten cross-ties as stated above. The mandatory part of the writ conforms to the allegations above set out.

It is contended that the allegations of the writ do not confine the alleged breach of duty to the alleged unsafe and unsuitable condition of the roadbed and track, because, in stating the duty of the respondent, the expression "and to furnish ample facilities for transporting the same" is used, thereby indicating that other considerations than the condition of the roadbed and track cause the breach of duty complained of. Even if this expression were objectionable on motion to quash, it is used only in stating the duty, and the context limits it to the roadbed and track. The charging part of the writ limits the breach of duty to the improper conditions of the roadbed and track, and the command is confined to the roadbed and track.

The contention that the amended writ requires the roadbed and track to be maintained according to an arbitrary standard as to the number and dimensions of the cross-ties to be used is well taken. While the courts, on a proper case made, will by mandamus require a railroad company to put and maintain its roadbed and track in a condition that renders them

reasonably safe and adequate to the public purposes and uses to which they are devoted, yet in the selection of the material and appliances, and as to the details of the dimensions, number, etc., thereof to be used in such repairs and maintenance, the railroad company has a proper discretion, which will not be dictated to or interfered with by the courts, unless abused, to the palpable detriment of the public service the company has to perform. In this respect, while the alternative writ presents an issue that may be joined in by the respondent, yet it is an issue which the court will determine on the case as made here. The requirement of the alternative writ that the respondent be compelled to repair its roadbed, so that it shall nave a regular, smooth, and even surface, is not, under the circumstances of this case, either so vague, indefinite, or uncertain that it cannot be intelligently answered. The issue so tendered is as to facts that are or should be peculiarly within the knowledge of the respondent railroad company, and that may be easily answered and disproved by the respondent, if untrue.

It is urged that the allegations and command of the amended writ are not sufficiently definite and specific to be answered by the respondent. When a writ of mandamus issues to enforce the performance by a common carrier of its duty to the public, the mandatory clause of the writ should state with sufficient definiteness the particular duty required to be performed, so as to enable the defendant to perform the duty with the writ as the guide. Where the duty is a general one, and its nature is such that some discretion in the performance of it is vested in the respondent, and the character of the duty and the particulars of the breach as alleged in the writ are peculiarly within the knowledge of the respondent, a general allegation of the duty to the public, with statements as to the violation of the duty by nonperformance or otherwise in terms sufficient to enable the court to specifically enforce a compliance with the mandate, will be sufficient on motion to quash the writ. See People *v.* Nostrand, 46 N. Y. 375, text 378; High on Ex. Legal Rem. §§ 536, 561; Rex *v.* Bristol Dock Co., 6 B. &.C. 181; 2 Spelling on Ex. Rem. § 1698; People ex rel. Green *v.* D. & C. R. R. Co., 58 N. Y. 152, text 162; 6 Ency. Pl. & Pr. 271.

The allegations of the amended alternative writ, "that said roadbed has an uneven and irregular surface, a large percentage of the cross-ties under the rails are rotten and wholly incapable of supporting an empty car thereon, at divers places along the said main lines of railroad, and for great distances the iron spikes which are driven into the cross-ties to support the rails can be lifted from the cross-ties with the naked hand, that many of the angle bars or plates on the main lines and bolts used in the same are broken, and that in many cases the angle plates are not fastened with the requisite number of bolts," are not too vague, in-

definite, and uncertain to be answered by the respondent. If these allegations are true, a breach of duty is made clearly apparent. The writ gives in detail by definitely named termini the location of the several parts of the main lines of the respondent's railroad complained of. If the roadbed and track on the main lines are in the condition described in the above allegations, the main line of the railroad as a whole must be in an unfit and unsuitable state for the public service in which it is used. The duty of respondent to maintain the roadbed and track in a suitable condition for rendering the public service is a general one, and necessarily requires the respondent to have a more or less detailed knowledge of every portion of the roadbed and track. Consequently any failure to perform its duty in regard thereto is especially within the knowledge of the respondent, and more specific allegations as to the points at which and particulars in which the breaches of duty occur are not required, in a case where a general duty to the public is sought to be enforced. The allegation is of a general duty which the respondent owes to the public, and not a particular duty due to an individual. The failure to put and maintain the roadbed and track in a proper condition for rendering adequate service to the public is the breach of duty alleged. The particulars of this breach are peculiarly within the knowledge of the respondent, since it has exclusive control and possession of the roadbed and track in the public use to which it is assigned. The allegations as to the uneven and irregular surface of the roadbed and condition of the cross-ties and angle bars and bolts on the roadbed and track are sufficient to apprise the respondent as to the charge of a breach by it of its duty to the public in not maintaining in suitable condition property constantly used by it while performing a general duty to the public. The respondent has a proper discretion in the performance of its public duty, even when such duty is performed in good faith under the command of judicial process. The writ is not subject to the objections made to it, except as to the details of the materials to be used in repairing the roadbed and track herein above pointed out. The allegations are sufficiently specific and definite to guide the respondent in the performance of a general duty to the public in particulars more especially within its own knowledge, and the writ will not be enforced so as to withhold from the respondent the discretion it is entitled to exercise in good faith in complying with the mandate.

The court will take judicial knowledge of the indisputable fact that a railroad is in an unsafe and unsuitable condition for the public service required of it when a large percentage of the cross-ties under the rails are decayed and wholly incapable of supporting the rails with the weight of an empty car thereon, and at divers places for long distances along the line of railroad the iron spikes driven in the cross-ties to support the rails can

be lifted from the cross-ties with the naked hand, and many of the angle bars or plates and bolts used to fasten the rails together are broken and missing from the ties on a railroad, as is alleged in the alternative writ in this case. When this condition exists, the court will issue its writ commanding the railroad company to put and maintain its roadbed and track in a reasonably safe and suitable condition adequate to meet the reasonable requirements of the public service. The particular number and dimensions of the cross-ties and other materials and appliances to be used will be left to the bona fide exercise of the reasonable discretion of the company. When a reasonably suitable, safe, and sufficient roadbed and track and accompanying appurtenances are furnished and maintained, so as to meet the reasonably just requirements of the public service, the law in that regard is satisfied.

The first four divisions of the motion to strike relate to the allegations in paragraphs 2, 3, 4, and 5 of the alternative writ as to lands granted by the state to the several companies which were merged into the respondent company. These allegations cannot be said to be wholly irrelevant to the duties and obligations of the respondent involved in this proceeding, and, when not improper, they should not be stricken from the writ. The taking of testimony under the allegations will be within the control of the court.

The motion to strike also covers the following portion of the sixth paragraph of the alternative writ. "That is to say: The said Atlantic Coast Line Railroad Company, by reason of the foregoing facts is, and since October 1, 1905, has been, obligated unto the state of Florida to accept and receive, transport and deliver, with reasonable safety and dispatch, all freight offered to it along said lines of railroad, proper to be transported by a common carrier in this state, and to furnish ample facilities for transporting the same in the manner aforesaid, at the reasonable tariff and charges adopted by said corporation and then in force, and to transport with reasonable safety and dispatch all passengers over said main lines of railroad, and to provide reasonably safe and convenient facilities therefor." The duty to transport with reasonable safety and dispatch, and for a reasonable compensation, all freight and passengers properly offered along the main lines of the railroad, necessarily includes the duty to maintain a suitable and proper roadbed and track on said main lines over which to transport the freight and passengers. Therefore the statement of the duty of the respondent as quoted should not be stricken.

The motion to strike parts of the alternative writ is denied. The motion to quash the alternative writ will be granted, unless the relator shall within five days from the 19th day of March, 1907, amend the same so that it shall not undertake to dictate

the dimensions, number, or details of the cross-ties or other material to be used by the respondent in the repair of its roadbed and track, but so that it shall generally require the respondent to put and maintain its roadbed and track along its main lines in a reasonably safe and suitable condition reasonably adequate to meet the requirements of the public service it has undertaken to perform, by replacing all decayed cross-ties with sound ones of such material and of such dimensions as will be reasonably adequate to the demands of the public service to be performed on such roadbed and track, and by replacing and properly securing all defective, broken, and missing angle bars or rail connections with sound ones, and by adequately spiking its rails to its cross-ties and by putting the surface of its roadbed along said mentioned main lines in a reasonably safe and adequate state of evenness and smoothness. If the alternative writ shall be so amended, the respondent shall have until April 9, 1907, in which to plead. Copies of this order and of the alternative writ as it may be amended shall be promptly mailed by the clerk of this court to the respondent's counsel.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

CAIRO, V. & C. RY. CO. *v.* WOODYARD et al.

(Supreme Court of Illinois, Feb. 21, 1907. Rehearing Denied April 18, 1907.)

[80 N. E. Rep. 882.]

Railroads—Powers—Statutory Provisions.—Hurd's Rev. St. 1905, c. 32, §§ 50-58, providing for changing the names, places of business, and objects for which corporations were formed, and which provides in section 57 for the giving of certain notice whenever any railroad corporation desires to consolidate with another under the act, is applicable to railroad companies.

Eminent Domain—Procedure—Right to Institute Proceedings.*—Hurd's Rev. St. 1905, c. 32, §§ 50-58, provides for changing or enlarging the objects for which corporations were formed. A rail-

*For the authorities in this series on the question as to who may exercise the power of eminent domain, see foot-notes appended to Caretta Ry. Co. *v.* Virginia-Pocahontas Coal Co. (W. Va.), 24 R. R. R. 761, 47 Am. & Eng. R. Cas., N. S., 761.

For the authorities in this series on the subject of the powers of a railroad company in regard to the location of its route, see Brown *v.* Atlantic & B. Ry. Co. (Ga.), 24 R. R. R. 255, 47 Am. & Eng. R. Cas., N. S., 255.

road company authorized by its charter to acquire real estate for the building of a line between certain places, subsequently, by a resolution of stockholders, under the statute, sought to enlarge the objects for which the corporation was formed so that it could construct and operate certain pieces of roadway which would in effect straighten and shorten the line of the corporation's road. Held, that the power of the corporation to proceed under the statute in reference to eminent domain for the purpose of relocating a portion of its road was not changed by the proceedings of the stockholders.

Same—Condemnation after Location of Railroad.†—Where a railroad authorized by its charter to construct a line of road between certain places had permanently located the road, it could not thereafter, under the statute in reference to eminent domain, condemn lands for the purpose of constructing pieces of roadway in order to straighten and improve the line of the road.

Appeal from Circuit Court, Edgar County; E. R. E. Kimbrough, Judge.

Proceedings by the Cario, Vincennes & Chicago Railway Company for the condemnation of lands. From a judgment in favor of defendants Caleb Woodyard and others, petitioner appeals. Affirmed.

R. L. McKinlay, Frank T. O'Hair, and *Hamlin & Gillespie* (*L. J. Hackney,* of Counsel), for appellant.

H. S. Tanner, H. Van Seller, W. S. Lamon, and *F. C. Van Seller,* for appellees.

SCOTT, C. J. This is an appeal from a judgment of the circuit court of Edgar county dismissing a petition filed in the court by the Cario, Vincennes & Chicago Railway Company, by which it sought to condemn certain lands for the purpose of building a short line of railroad. This short line, approximately two miles in length, if built, would connect at each end with the present line of appellant, and the purpose of appellant is, by building this proposed line, to straighten its roadway and provide for a roadbed with a more satisfactory grade than that which exists in the portion of the roadbed which would be superseded by the new piece of track. The court below held that appellant could not exercise the power of eminent domain for the purpose of so relocating its road.

Appellant is duly incorporated under the railroad act of this state, and is authorized by its original charter to acquire real estate for right of way and for any other lawful purpose connected with the building and operation of its

†Whether a single exercise of power of eminent domain exhausts right, see note, 3 Am. & Eng. R. Cas., N. S., 34; Lusby *v.* Kansas City, etc., R. Co. (Miss.), 19 So. 239, 3 Am. & Eng. R. Cas., N. S., 447.

road, and to purchase, own, construct, operate, and maintain (and in pursuance of its charter did purchase and operate) a railway extending from the city of Cairo, in the county of Alexander, through certain counties, to Tilton, in the county of Vermilion, in the state of Illinois, together with a branch extending from St. Francisville, in Lawrence county, Ill., to the city of Vincennes, in Knox county, Ind. After appellant became the owner of said railway, and on July 1, 1905, the stockholders held a meeting, and by resolution sought to enlarge the objects for which the railway company was formed, so that the said railway company could, among other things, "construct, own, operate and maintain additional lines of railway, particularly described as follows." Then follows a description of the line of nine proposed separate short peices of roadway, each beginning at some point on the present right of way of appellant and ending at another point on that right of way, the effect of each of which, if constructed, would be to straighten and shorten appellant's line of road.

It appears from the petition that the railway in question has been in operation for more than 20 years; that it passes through a portion of the state of Illinois that is either rough and hilly or undulating and greatly varing in surface level; that it was built before the introduction of modern, high-class railroad equipment, and before the inauguration of the efficient methods of railroad operation now in vogue, and that it was constructed with little or no regard to economy and efficiency of operation, but chiefly with a view to cheapness of construction; that in its location hills and the high levels of surface were avoided by the following waterways, making the road longer between the termini than necessary, and rendering it, by reason of its sharp curves, dangerous to persons and property being transported over the road. It further appears that the road cannot by practical engineering, unless its line be straightened, be made an efficient, modern commercial railway capable of fully answering the requirements of the communities through which it passes, or capable of being operated with such cars, engines, and trains as are used upon properly equipped railroads in Illinois passing through communities similiar to those through which this road passes; that during the last 20 years the portion of Illinois traversed by this highway has grown rapidly in wealth, population, and mining, agricultural, and other industries, and needs a properly constructed, equipped, and managed railroad, and that appellant has planned a reconstruction of its road and changes in its rolling stock designed to meet this want, but that its purposes cannot be accomplished unless it can shorten the line of its road, straighten the curves, and reduce the grades; that to do this certain departures from the original line of the road will be nec-

essary; that the proposed section of roadway involved in this litigation is designed as one of such departures, but that in this instance, as in all others, no other or greater departure or variation from the original line is made or contemplated than is necessary for the proper and practical operation of the road.

It is said that unless such changes can be made the road cannot be conducted with profit, but must be abandoned, wherefore the public interests require that portions of the line should be relocated, so that a safe and modren roadbed may be constructed, upon which trains may be operated of a character and in a manner commensurate with the needs and wants of the thrifty and progressive communities through which the road passes.

In seeking to enlarge the objects of this railway company its stockholders moved under the provisions of an act of the Legislature originally passed in 1873 and amended in 1889, entitled "An act to provide for changing the names, for changing the places of business, for increasing or decreasing the capital stock, for increasing or decreasing the number of directors, for enlarging or changing the objects for which such corporations were formed and for the consolidation of incorporated companies," which is found at page 507, c. 32, § 50, of Hurd's Revised Statutes of 1905. There seems to have been some question in the court below as to whether this act applied to railroad corporations. An examination of its various provisions leads us to the conclusion that it does so apply. Section 8 of the act (Hurd's Rev. St. 1905, c. 32, § 57) provides for the giving of certain notice whenever any railroad corporation by virtue of the provisions of this act, from which it seems certain that the purpose of the Legislature was to give to railroad corporations the benefit of the act. A like conclusion was reached upon an analogous proposition in People *v.* Rose, 210 Ill. 582, 71 N. E. 580.

We are of the opinion, however, that the right or power of the appellant to proceed under the statute in reference to eminent domain for the purpose of relocating a portion of its roadway was not changed by the proceedings of its stockholders on July 18, 1905. The portion of the statute under which they acted which is particularly relied upon is found in that clause thereof which authorizes the stockholders "to enlarge or change the object for which such corporation was formed." The object for which this corporation was formed was to "purchase, own, construct, operate and maintain" a railway between Cairo, in Alexander county, and Tilton, in Vermilion county, with a branch line from a point in Lawrence county to Vincennes, Ind. If by the action of its stockholders it was legally authorized to straighten the curves in its lines by relocating a portion of its roadway, it could not be said that the object for which it was formed had been thereby enlarged or changed. The object would remain the same, namely, to "purchase, own, construct, operate and main-

tain" a railway between the same points and not between other points, and not to points beyond those above mentioned.

The general rule is that where the termini and general route of the railroad are prescribed by the charter, leaving the determination of details to the discretion of the corporation, the power of the company to fix the location of the road is exhausted after such discretion has been exercised, and it cannot relocate its road without statutory authority to do so, and, being without power to relocate its road, the company is without power to condemn a right of way for a line which it cannot lawfully locate. People *v.* Louisville & Nashville Railroad Co., 120 Ill. 48, 10 N. E. 657; Illinois Central Railroad Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; Lake Shore & Michigan Southern Railway Co. *v.* Baltimore & Chicago Railroad Co., 149 Ill. 272, 37 N. E. 91; Chicago, Burlington & Quincy Railroad Co. *v.* City of Chicago, 149 Ill. 457, 37 N. E. 78; Chicago & Milwaukee Electric Railroad Co. *v.* Chicago & Northwestern Railway Co., 211 Ill. 352, 71 N. E. 1017.

Appellant contends, however, that it falls within an exception to this general rule, which, it avers, exists whenever the interests of the public will be best served by a change in the location of the road, and where, from a business or financial point of view, it is essential to tne accomplishment of the things for which the road is built that a change should be made.

Appellant relies upon two Illinois cases as illustrative of the doctrine for which it contends. The first of these is Chicago, Burlington & Quincy Railroad Co. *v.* Wilson, 17 Ill. 123. In that case the charter authorized the railroad company to construct a railroad on a certain route, "with such appendages as may be deemed necessary for the convenient use of the same." Two or three years after the road had been built and the company had located its stations, depots, turn-outs, etc., it sought to condemn real estate for the purpose of constructing and maintaining thereon turn-outs, depots, engine houses, shops, and turntables, and this court held that the completion of the road between the termini did not exhaust the power thereafter to acquire, by condemnation, real estate demanded by an increase of business, upon which to locate "appendages." In other words, that the company was at liberty to acquire land for "appendages" as they became necessary for the convenient use of the road. That case was not one in which the company, having elected to occupy certain real estate, sought thereafter to occupy other real estate in lieu of that first selected. The other case from our own Reports, to which our attention is particularly called in this connection, is Fisher *v.* Chicago & Springfield Co., 104 Ill. 323. There the Chicago & Springfield Railroad Company owned a side track which had been constructed over a strip of land in the town of Mt. Pulaski, in Logan county, by the permission

of the owners of the land; no title to the land having been acquired by the railroad company. Later it began a suit to condemn the land so occupied by its side track. It was objected that the company could not exercise the right of eminent domain for the purpose of acquiring land for the side track, "especially after the main line is finished," but it was held that the company had the same right to institute condemnation proceedings to acquire the land occupied by the side track that it would have had to institute such proceedings at an earlier day. No question of relocation was there involved.

We have examined the text-books and the decisions of courts of other states to which appellant has referred us. The only one of the cases cited which can be said to be in point is that of M. & T. R. R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. Rep. 608. The force of that case, however, is destroyed by the fact that the Supreme Court of the state of Mississippi, in Lusby *v.* Railroad Co., 73 Miss. 360, 19 South. 239, 36 L. R. A. 510, has repudiated and overruled it and announced its adherence to the general rule. Leaving out of consideration the Devaney Case, we think the most favorable view of the authorities relied upon by appellant is that they support the conclusion well stated by Randolph at section 116 of this work on the Law of Eminent Domain, in these words: "A railroad company may continue to condemn for such incidental uses as the growth of business demands." It is plain that the use of real estate for the main line of a railway company is not an "incidental use."

We conclude that to the general rule above stated there is no such exception as that which appellant seeks to have us recognize.

By the proceedings of July 18, 1905, the stockholders of appellant sought to authorize the company to extend its line from Tilton, in Vermilion county, to the city of Danville, in Vermilion county. No question as to the legal effect of that action of the stockholders is presented for our consideration.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

KAUFMAN *v.* PITTSBURG & C. S. R. CO. *et al.*

(Supreme Court of Pennsylvania, April 22, 1907.)

[66 Atl. Rep. 1108.]

Railroads—Power to Lease.*—Where a railroad company is incorporated under the general railroad act of April 4, 1868 (P. L. 62), and acquires additional powers under the special act of February 21, 1872 (P. L. 142), enabling it to own and operate coal mines, and by special act of April 5, 1873 (P. L. 546), to construct and operate inclined planes, it may lease its railroad to a railway company organized under special act of May 25, 1871 (P. L. 1170), with general powers.

Same.*—Where a railroad company has under its charter power to construct a railroad for another company to operate, and also to operate a railroad for its own use, it can lease the railroad which it operates for its own use for a term of years.

Same—Conditions.—The general railroad acts April 23, 1861 (P. L. 410), and February 17, 1870 (P. L. 31), requiring the railroads of a lessor and lessee to be connected, do not apply to act May 25, 1871 (P. L. 1170), conferring on certain corporations chartered by the Legislature express power to merge, consolidate, or unite with any other company.

Bill by Sibilla Kaufman against the Pittsburg & Castle Shannon Railroad Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following is the opinion of Macfarland, J., in the court below:

"(1) The Pittsburg & Castle Shannon Railroad Company, hereinafter called the 'railroad company,' is a corporation organized under the general railroad act of April 4, 1868 (P. L. 62), and having by the special act of February 21, 1872 (P. L. 142),

*For the authorities in this series on the subject of the power of railroad companies to lease their property or to accept leases, see McCabe *v.* Maysville, etc., R. Co. (Ky.), 1 R. R. R. 940, 24 Am. & Eng. R. Cas., N. S., 940 (authority to lease road of another company under certain Kentucky statute); State *v.* New Orleans Warehouse Co. (La.), 7 R. R. R. 334, 38 Am. & Eng. R. Cas., N. S., 334 (was no ground to annul lease that it was made pendente lite; and power of railroad to lease portion of property for hotel purposes); Van Steuben *v.* Central R. Co. (Pa.), 9 Am. & Eng. R. Cas., N. S., 485 (validity of lease of nonconnecting roads under Pennsylvania laws); South Carolina, etc., Ry. Co. *v.* Carolina, etc., R. Co. (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 212 (power of receiver to lease and operate other railroads); notes, 11 Am. & Eng. R. Cas., N. S., 381, 15 Am. & Eng. R. Cas., N. S., 841 (whether constitutional prohibition against consolidation prevents leasing of railroads).

the right to own real estate and mine coal therefrom, and by the special act of April 5, 1873 (P. L. 546), the right to construct an incline plane. The plaintiff was in August, 1905, and still is the owner of 50 shares of stock of the said company.

"(2) The Pittsburg Railways Company, hereinafter referred to as the 'railways company,' was incorporated by a special act of assembly May 25, 1871 (P. L. 1170), under the name of the 'Surety Company,' subsequently changed to the present name, and its principal business is that of operating traction lines and passenger railways in the county of Allegheny.

"(3) The Pittsburg Coal Company, hereinafter referred to as the 'coal company,' is a corporation under the laws of the state of New Jersey, having its principal office in the city of Pittsburg, Allegheny county, and is engaged extensively in the mining and selling of coal in the said and adjacent counties; and it is the owner of 7,756 shares of the stock of the Pittsburg & Castle Shannon Railroad Company, out of a total of 9,628 shares.

"(4) The board of directors of the railroad company, 10 in number, if with one exception composed of officers and directors of the coal company, and the railroad company has been for several years controlled and managed by the coal company.

"(5) The executive officers of the railroad company, its superintendent, engineer, and accounting officers, were officers in a similar capacity of the coal company, which charged the railroad company for their services a reasonable amount, and the operating expenses of the railroad company were, in this respect, much less than they would have been if independently officered.

"(6) The railroad operated by the railroad company extends from Arlington Station, Scott township, Allegheny county, to a point on Bailey avenue in the Thirty-Second Ward in the city of Pittsburg, and then by an incline plane with the road running from Bailey avenue to Carson street in the city of Pittsburg. It also owns and operates coal mines in Scott township. Prior to January 1, 1893, the railroad ran by a horseshoe curve track north of Washington avenue, in the Thirty-Second Ward, in the city of Pittsburg, via a coal tunnel and coal incline to Carson street in the Thirtieth Ward, Pittsburg, where there was and is now located a coalyard of the railroad company. About the last-mentioned date the company constructed a shorter and more direct line diverging from the former route at a point near Washington avenue, in Montooth borough, and by incline planes reaching Carson street at a point adjoining the coalyard. Upon the completion of the new short line the horseshoe curve track, coal tunnel, etc., were used solely for the transportation of coal from the mines of the company to the yard, and were not used for the transportation of freight and passengers, except on several occasions prior to the year 1900 passengers were so transported on account of accidents to incline planes on the shorter route, which

from January, 1893, was used exclusively for passengers and freight and became the main line of the railroad. The horseshoe curve portions of the track were used in connection with the coalyard as a part of the terminal facilities of the railroad company in its mining and shipping of coal.

"(7) On July 13, 1904, the railroad company leased to the coal company, at $30 a month, for the term of three years from July 1, 1904, a lot which had been used as a dump for refuse, and the coal company erected thereon a laboratory for its use and the use of the railroad company.

"(8) For some time prior to any negotiations for the lease in this case the coal company had erected telephone wires, at its expense, along the right of way of the railroad, and this line was used by the coal company and the railroad company without charge to the latter.

"(9) The coal company has, and has had, an agreement or understanding with the railroad company for the use of the horseshoe curve portion of the tracks, and has not, at any time, used these tracks or any part thereof, and it does not own, control, or operate in any way any mines or other property on or near the line of the railroad company.

"(10) The railroad company was in August, 1905, and had been for several years previous, insolvent. Its coal property was valuable, and was capable of being operated with profit, but the railroad had for a long time been operated at a loss of more than $3,000 a month, which was almost an offset to the earnings of the coal business of the company.

"(11) During the months of July and August, 1905, the railroad company began negotiations with one Baxmyer for the lease of the railroad, and a meeting of the stockholders of the railroad company was called on August 16, 1905, for the purpose of considering a proposition for the leasing or selling of certain of its property, and there was then presented to the stockholder a resolution authorizing the execution of a lease, and it was then stated that the proposed lessee was the railways company, and that the proposed lease was in pursuance of a resolution of the board of directors, made on July 21, 1905. Objections were made by some of the stockholders, including the plaintiff, and a verbal offer was made to take a lease at the rent of $20,000 per annum. The meeting adjourned to August 17th, at which time William Kaufman, acting on behalf of a principal whose name he refused to disclose, but with whom the plaintiff had no privity, but who was, some time after the execution of the lease, disclosed to be Robert C. Hall, a broker and promoter, of the city of Pittsburg, offered in writing that he, Kaufman, would, on or before August 24th, bid at least $17,500 for the lease in the same form as that submitted, and as evidence of his good faith he deposited three bonds of $1,000 each. The meeting was

adjourned to August 24th, at which time Kaufman did bid $17,500 per annum for the lease for a term of 99 years, and for a further term of 99 years at $20,000 per annum. This bid was in writing. The said bid was not submitted for the consideration of the stockholders, for the reason that the identity of the principal was not disclosed, although demanded, and it appeared on the bid that there was no corporation competent to take the lease; and it was known by the directors and by the plaintiff and most of the stockholders present that the railways company was ready and willing to execute the lease, and that it was a strong corporation, of a good credit, and capable of carrying out the terms of the lease.

"(12) The action of the coal company as a majority stockholder, and of the officers of the railroad company, in voting for the lease and in subsequently executing it, was prudent and in good judgment and was advantageous to all of the stockholders, and the refusal of the Kaufman bid was in good faith and in the exercise of good judgment. It developed upon the trial of this case that Mr. Hall had no connection with or control over any corporation capable of taking a lease, and his purpose in desiring to acquire the lease was simply as a speculation.

"(13) At the last-mentioned meeting an election was had upon the proposed lease. The coal company cast its stock in favor of the resolution, and out of a total of 9,628 shares 8,153 shares were cast in favor to 66 against the resolution, the affirmative vote being composed of the stock of the coal company and its officers, directors, and employees, with the exception of 350 shares, and of the 66 shares, 50 were owned by the plaintiff and 16 by E. F. Hays.

"(14) Neither the coal company nor any of its officers nor any of its subsidiary companies or their officers have received or will receive any pecuniary or other benefit or advantage in consideration of voting its stock in favor of the lease, except such benefits and advantages as accrue equally to all of the stockholders of the railroad company.

"(15) The lease dated August 25, 1905, was executed for the railroad company for its president on the morning of August 25th, and by its secretary in the evening of that day, and was executed by the railways company on August 26th; and as early as 12:25 p. m. August 25th, notice was served upon the railways company by plaintiff, requiring the defendant not to execute the lease or to pay out any money on account thereof. This bill was filed on August 30th and served the same day. The railways company entered into possession, and since that time has been operating the portion of the railroad leased to it.

"(16) On or before September 1, 1905, the railroad of the defendant railroad company did not connect with nor intersect any other railroad nor physically with the road or railway of any

street railway company, and the railways company did not own, control, lease, or operate a railroad physically connected with that of the railroad company. The railways company's tracks are situated, with reference to the railroad company's tracks, at a number of points, as follows: At Carson street within 60 feet, at which point passengers have been for several years transferred between the respective companies under the terms in an agreement; on Bailey avenue, within 4 or 5 feet; near Arlington avenue the railways' tracks cross the railroad above grade; the Washington avenue line parallels the railroad for more than a quarter of a mile, at a distance from 20 to 60 feet; at another point the lines are 150 feet apart, and the intervening land is leased by the railways company; from Arlington to Castle Shannon the lines parallel for about half a mile, at a distance from 25 to 200 feet; and in Castle Shannon a spur of the railroad extends to within 10 feet of the railways' tracks. At all but one of these points the transshipment of passengers from one road to the other is easy and convenient.

"Conclusions of Law.

"(1) There being no fraud or undue advantage, the lease is not void on that grouud.

"(2) The lessor has not violated any duty to the commonwealth.

"(3) The lessee has the right to take the lease.

"(4) The lessor has the right to make the lease.

"(5) It is not necessary under the charter of the lessee that the lines be mechanically connected, and it is sufficient that they are in proximity so as to afford convenient transfer of passengers.

"(6) The bill should be dismissed, at the costs of the plaintiff."

Argued before MITCHELL, C. J., and BROWN, ELKIN, and STEWART, JJ.

Wm. Kaufman and *E. F. Hays*, for appellant.
David A. Reed and *Charles M. Johnson*, for appellees.

ELKIN, J. The answer to the third proposition contained in appellant's statement of the question involved will control all the material questions raised by this appeal. Does the charter of the defendant railway company authorize it to take the lease, the execution of which is sought to be enjoined by appellant, and if so, will the lease be held valid for that reason, even though the charter of the railroad company did not in express terms confer the power to enter into such a contract?

The defendant railroad company is a corporation organized under the general railroad act of April 4, 1868 (P. L. 62); and by the special act of February 21, 1872 (P. L. 142), it is given the power to purchase and own real estate and mine coal therefrom. Under the act of April 5, 1873 (P. L. 546), it has the right to construct an incline plane. The learned court below has

found as a fact that said railroad company was in August, 1905, and had been for several years prior thereto, insolvent. Its coal property was valuable, and was capable of being operated with profit, but the railroad had for a long period of time been operated at a loss of more than $3,000 per month. The railroad company, being desirous of relieving itself from the operation of the road, opened negotiations for the purpose of making a lease of the same for a term of years. Several meetings were held for the purpose of considering a proposition looking to a leasing of the railroad, and on August 24, 1905, the final meeting of the stockholders of the railroad company was held, at which 8,153 shares were voted in favor of the lease and 66 against it. The appellant voted 50 shares out of the total of 66 against the resolution. The learned court below has found as a fact that the lease was an advantageous one for the stockholders of the railroad company to make, and that there was no fraud or collusion in the transaction. Indeed, we do not understand that the learned counsel for appellant raises any such question on this appeal, but relies entirely on the legal proposition above stated.

The Pittsburg Railways Company derives all of its powers under the special act approved May 25, 1871 (P. L. 1170). This company is one of seven or eight corporations chartered by the Legislatures of 1870 and 1871 which have been granted very broad and comprehensive powers. It is clearly within the power of this company to engage in the transportation of passengers and freight by land or water, for it is so expressly written in the act creating it. In section 2 it is given the power "to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation or conveyance of freight, live stock, passengers and any other traffic, by land or water." In section 4 it is given the power to purchase, make, use, and maintain any works or improvements connected with the works of said company, and to merge or consolidate or unite with said company the improvements, property, and franchises of any other company. It will be observed that this company is given the express power to merge, consolidate, or unite with its works or business the improvements, property or franchises of any other company. It also has the power to purchase, make, use and maintain any works or improvements of another company connecting or intended to be connected with the business of said company. When these general powers are considered in connection with the power to build, construct, maintain, or manage any work or works, public or private, intended to improve, increase, facilitate, or develop trade, travel, or the transportation or conveyance of freight, passengers, and other traffic by land or water, conferred by section 2, there can be no doubt that the railways company had the power to enter into a contract of lease with the

railroad company, under the terms of which it is to use and maintain the property of the railroad company for a term of years at a fixed annual rental agreed upon. It cannot be seriously questioned that the railways company under its charter has the power to build a railroad for another corporation to operate, nor can it be doubted that it has the power to build and operate a railroad for its own use, and it necessarily follows that, if it can construct a railroad for another company to operate and can operate a railroad for itself, it can lease a railroad for its own use for a term of years. The power to purchase outright certainly includes the power to lease and operate for a definite term. The greater includes the lesser power.

It may be objected that the Legislature was improvident in conferring upon this and the several other companies created by the special acts during the legislative sessions of 1870 and 1871 such omnibus powers; but this is a legislative, and not a judicial, question. In International Navigation Company *v.* Commonwealth, 104 Pa. 38, Hespenheide's Appeal, 4 Penny. 71, and Carothers *v.* Philadelphia Company, 118 Pa. 468, 12 Atl. 314, it was held that the rights and franchises granted by these special acts were a valid exercise of the legislative power. In the last case cited it was distinctly held that the power conferred was sufficiently comprehensive to authorize that particular company to engage in the production, distribution, and supply of natural gas for fuel.

It seems to be conceded in the argument of the learned counsel for appellant that the railways company has the general power to engage in the transportation of freight or passengers; but it is earnestly contended that the provisions of the acts of 1861 (P. L. 410) and 1870 (P. L. 31), requiring the railroads of a lessor and lessee to be "connected," should apply, and that the lines of the defendant railways company and railroad company do not have a physical connection, and for this reason the lease must fall. In this connection it should be observed that the words "connected or intended to be connected," in the act of 1871 which created the defendant railways company, are of much wider significance in the matter of acquiring connecting lines than are the provisions of the general railroad acts referred to. The question involved in this case has nothing to do with the rights or limitations of railroad companies under the general acts of 1861 and 1870. The defendant railways company, in so far as these general powers are involved, looks to the act of its incorporation, and is not controlled by the acts referred to. Even under the railroad acts of 1861 and 1870, it has been held that the roads of the lessor and lessee need not be so connected that the same cars shall pass from one road to the other without interruption, but only that they shall be so connected that a convenient interchange of passengers and freight is possible. Philadelphia &

Erie Railroad Company *v.* Catawissa R. R. Co., 53 Pa. 20; Hampe *v.* Pittsburg & Birmingham Traction Company, 165 Pa. 468, 30 Atl. 931. However, it is unnecessary to discuss the question whether the lines of the two companies were so connected as to meet the requirements of the acts of 1861 and 1870, because the rights of the lessor and lessee in this case are controlled by the act of 1871, under which the lessee company was incorporated.

It is now urged, however, that, even conceding that the railways company had the power to take the lease in question, the railroad company did not have the power to make it. This does not now seem to be an open question in this state, as it has been expressly held by this court that the power to take, expressly conferred upon the railways company, implies the power in the lessor company to make the lease. Pinkerton *v.* Pennsylvania Traction Company, 193 Pa. 229, 44 Atl. 284. In that case the present Chief Justice, speaking for the court, said: "Nor is there any weight in the objection that the passenger railway company had no power to lease its road. The power to take a lease is expressly given to the motor company, and the corresponding power in the passenger railway company, as owners, to give a lease, is necessarily implied. Without it, the grant in the act would be nugatory." To the same effect are the cases in other jurisdictions. In re Prospect Park & Coney Island Railroad Company, 67 N. Y. 371; N. Y. & N. E. R. R. Co. *v.* N. Y., N. H. & H. R. R. Co., 52 Conn. 274; Huntting *v.* Hartford Street Railway Company, 13 Conn. 179, 46 Atl. 824. From the rule stated in these cases it clearly appears that the railways company, under its act of incorporation, having the power to enter into the lease with the railroad company, and there being no limitation on the power of the railroad company to enter into the lease, and therefore no violation of any statutory requirement, it had an implied power to make the lease in question.

Decree affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. *v.* BUTLER.

(Supreme Court of Arkansas, April 29, 1907.)

[102 S. W. Rep. 378.]

Carriers—Injury to Cattle—Transportation Contract.*—Where shippers of cattle did the loading, and the transportation contract provided that they assumed the risk arising from loading and exempted the carrier from all liability for loss and damage arising therefrom and from want of bedding, the carrier was not liable for damages to the cattle by reason of overloading and lack of bedding.

Same—Exemption from Liability—Validity.*—A stipulation, in a cattle transportation contract, that in consideration of a reduced freight rate the shipper released the railroad company from liability for damages arising from loading and want of bedding, was valid.

Same—Contract—Limitations.†—Where a cattle transportation contract provided that no suit should be maintained thereon after six months from the date the cause of action accrued, an action not begun until May 17, 1904, for injuries to the cattle in September, 1903, was barred.

Appeal from Circuit Court, Miller County; Joel D. Conway, Judge.

Action by J. R. Butler and others against the St. Louis Southwestern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

S. H. West and *Gaughan & Sifford,* for appellant.
Webber & Webber for appellees.

BATTLE, J. On the 23d day of September, 1903, J. R. Butler and Huddleston Bros., at McNeil, a station on the St. Louis Southwestern Railway, in this state, delivered to the St. Louis Southwestern Railway Company 52 head of cattle to be shipped, in the name of S. S. McCarver, to Huddleston Bros., at Texarkana, Ark., under and pursuant to the terms and conditions of the following contract:

"This agreement made between the St. Louis Southwestern Railway Company, of the first part, S. S. McCarver, of the second part, witnesseth that for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described

*See extensive note, 9 R. R. R. 6, 32 Am. & Eng. R. Cas., N. S., 6; foot-notes appended to Illinois Cent. R. Co. *v.* Holt (Ky.), 21 R. R. R. 455, 44 Am. & Eng. R. Cas., N. S., 455.

†See note at end of case.

below, and the parties in charge thereof, as hereinafter provided, viz:

"One car said to contain 52 head of stock cattle from McNeil, Ark., station, to Texarkana station, consigned to Huddleston Bros., Texarkana, Ark., at the rate of Tf ——— per ———, from McNeil to Texarkana, subject to minimum weights and lengths of cars specified and provided for in tariff; said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations, it is mutually agreed between the parties hereto as follows: * * *

"Second. That the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination any particular hour, nor in season for any particular market.

"Third. That the first party is exempted from liability for loss or damage arising from derailment, collision, fire, escapement from cars, heat suffocation, overloading, crowding, maiming, or other accidents or causes not arising from negligence of the first party.

"Fourth. That the second party shall assume all risk, expense of feeding, watering, bedding and otherwise caring for the live stock covered by this contract while in cars, yards, pens, or elsewhere, and shall load and unload the same at his own expense and risk. * * *

"Sixth. That, as a condition precedent to any damages, or any loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or to the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or front the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to fully comply with the provisions of this claim shall be a bar to the recovery of any and all such claims. * * *

"Thirteenth. That no person other than the owner of the stock shipped, or his duly authorized agent, in the name of the owner, shall be allowed to sign this contract.

"Fourteenth. That no suit or action against the first party for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall occur; and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

"Fifteenth. That in making this contract, the undersigned owner or other agent of the owner, of the stock named herein, expressly acknowledged that he has had the option of making this shipment under the tariff rates, either at carrier's risk or upon a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations and conditions herein named.

"Sixteenth. That the evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed rules and regulations on the back thereof, and that they all constitute a part hereof, fully assents to each and all of the same, is his signature hereto.

"F. A. Key, Agent for St. L. S. W. Ry. Co.

"S. S. McCarver, Shipper."

The cattle, except one, were delivered at Texarkana, in a damaged condition, six were dead, six died soon after, and one escaped. On the 17th day of May, 1904, Butler and Huddleston Bros. brought this action in the Miller circuit court against the St. Louis Southwestern Railway Company to recover the damages, and alleged in their complaint that the cattle were delivered as before stated. "That defendant accepted the cattle, issuing its bill of lading therefore in the name McCarver, and negligently failed to provide a suitable and safe car for their transportation, but loaded the cattle in an old and defective car, unsuitable for same, in this, to wit, that said car was not a regular stock car, and had a damaged floor, with holes therein, and was otherwise battered and defective, and willfully and negligently loaded said cattle without bedding of any kind, and that defendant so willfully and negligently handled its train between the points named that said cattle were thrown against each other, against the sides and upon the floor of said car, whereby they were killed, maimed, bruised, and otherwise injured. That after reaching Texarkana, defendant unloaded said cattle and after unloading willfully and negligently permitted to escape from the pens one cow of the value of $15. * * * That by reason of the acts of negligence complained of, plaintiffs have been damaged in the sum of $336, with interest at the rate of 6 per cent. per annum from October 1, 1903."—and ask for judgment for that amount and interest.

"The defendant answered denying every material allegation of the complaint, and alleging that it had nothing to do with the bedding of the car, and pleading the conditions of the contract of shipment, wherein it was stipulated that the shipper would assume all risks and expenses of bedding, watering, feeding, and otherwise caring for the stock while in cars, yards, pens, or elsewhere, and he should load and unload same at his own expense and risk; and that whatever injuries said stock received was on account of the fact that they were overloaded, or the fact that the shipper

failed to bed the car, or from the fact that strong and weak cattle were put in the same car; and also pleaded in bar of the action a provision in the contract of shipment that suit should be brought within six months on a claim for damages arising therefrom."

Defendant alleged that the shipper, McCarver, traveled with the cattle and had charge of them while en route.

Plaintiffs recovered a judgment for $293, and the defendant appealed.

Appellant furnished appellees with a defective car, unfit for the purpose it was used. The cattle were of various sizes and ages. Neither of appellees were present when the car was loaded. Their agents or servants loaded the car with the cattle, crowding all of them in the same car without any bedding. Many of the cattle were thrown down and trodden under foot while in the car. Six died on the cars; six died soon after delivery from injuries received in transitu. The evidence tended to show that overloading and loading the weak and strong cattle in the same car, and the failure to furnish the car with bedding, contributed materially to the damage of the cattle. The cause of action occurred in September, 1903, and this action was commenced on the 17th day of May, 1904, more than six months after the cause of action accrued.

The court instructed the jury, over the objections of the appellant, as follows:

"If you find from a preponderance of the evidence in this case that the plaintiffs, through their agent, one Carver, delivered cattle to the defendant at McNeil, Ark., for transportation to Texarkana, and that said cattle were injured and damaged by reason of a defective or unsuitable car, provided them by the defendant, or by reason of overloading by the railroad company or lack of bedding in said car then your verdict should be for the plaintiffs."

And refused to instruct the jury, at the request of appellant, as follows:

"The jury are instructed to render a verdict for the defendant. * * *

"(3) The jury are instructed that, unless the plaintiff has shown by a preponderance of the evidence that the stock were injured either on account of a defective condition of the car in which they were shipped, or on account of some rough handling of the train in which the cattle were being carried, which was not ordinarily incident to the handling of freight trains, their verdict must be for defendants.

"(4) The jury are instructed that the defendant is not liable for any injuries to the cattle caused by their inherent vices or natural propensities, and they find from the evidence that the injuries to the stock were caused by being overloaded or on account of small and weak cattle being loaded with large and strong

cattle, thereby causing the weaker ones to be knocked down and trampled on. For such injuries your verdict must be for the defendant.

"(5) The jury are instructed that the plaintiff's assumed the risks and expense of bedding, watering, and feeding, and otherwise caring for the stock while in the cars, pens, yards, or elsewhere, and they also assumed the risks and expense of loading and unloading the same. And they cannot assess against the defendant any damages for injuries occasioned by these things."

And modified and gave them, over the objections of the appellant, as follows:

"(3) The jury are instructed that, unless the plaintiff has shown by a preponderance of the evidence that the stock were injured either on account of a defective condition of the car in which they were shipped, or for want of bedding, if the agent agreed to bed the car, or on account of some rough handling of the train in which the cattle were being carried, which was not ordinarily incident to the handling of freight trains, their verdict must be for defendant.

"(4) The jury are instructed that the defendant is not liable for any injuries to the cattle caused by their inherent vices or natural propensities, and if they find from the evidence that the injuries to the stock were caused by inherent vices or natural propensities, or on account of small and weak cattle being loaded with large and strong cattle, thereby causing the weaker ones to be knocked down and trampled on, for such injuries, your verdict must be for defendant.

"(5) The jury are instructed that the plaintiffs assumed the risks and expense of bedding, watering, feeding, and otherwise caring for stock while in the cars, pens, yards, or elsewhere, and they also assumed the risks and expenses of loading and unloading the same. And they cannot assess against the defendant any damages for injuries occasioned by these things, unless the agent of the company agreed to do these things itself."

The court erred in instructing the jury to return a verdict for appellees, if they found that the cattle were damaged by reason of overloading by the railroad company or lack of bedding. There was no evidence that the railroad company loaded the car, but, on the contrary, the undisputed evidence shows that the appellees did the loading, and assumed the risk of the loading, and exempted appellant from all liability for loss or damage arising from loading and want of bedding. This stipulation was based upon a valuable consideration, and is valid and binding. St. Louis, Iron Mountain & Southern Ry. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. 961.

The instructions as a whole are defective, in this, they are inconsistent.

Note

It was agreed by all the parties to the contract sued on: "That no suit or action against the first party [appellant] for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such action be commenced within six months next after the cause of action shall occur; and should any suit or action be commenced against the first party [appellant] after the expiration of six months, the lapse of time shall be conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." The cause of action occurred in September, 1903, and this action was commenced on the 17th day of May, 1904. According to the contract of the parties, it was barred, and cannot be maintained. St. Louis & San Francisco Railroad Company *v.* Bart Pearce *et al.*, 101 S. W. 762.

The appellees allege in their brief that "the carrier must afford the shipper the opportunity to contract without limitations upon its common-law liability; otherwise the limitations are void." No such right or duty was involved in the issues in this case, and no question involving it is presented for our consideration. The validity of the contract sued on was not questioned in the trial in the circuit court.

Reverse and remand for a new trial.

NOTE.

CARRIERS OF FREIGHT—VALIDITY AND EFFECT OF PROVISION OF SHIPPING CONTRACT LIMITING TIME WITHIN WHICH ACTION FOR LOSS OF OR DAMAGE TO FREIGHT MAY BE BROUGHT.

1. GENERAL RULE.

A stipulation in a contract of shipment that suit for loss of or injury to freight shipped under the contract must be brought within a time less than the statutory period is valid, provided the period fixed is not unreasonably short and there is no constitutional or statutory provision by which such a stipulation is prohibited.

United States.—Central Vermont R. Co. *v.* Soper, 59 Fed. Rep. 879; Cray *v.* Hartford F. Ins. Co., 1 Blatch. (U. S.), 280; Ginn *v.* Ogdensburg Transit Co. (C. C. A.), 85 Fed. Rep. 985; Riddlesbarger *v.* Hartford Ins. Co., 7 Wall. (U. S.), 386.

Georgia.—Brown *v.* Savannah Mutual Ins. Co., 24 Ga. 97.

Massachusetts.—Cox *v.* Central Vt. R. R., 170 Mass. 129, 49 N. E. 97.

Missouri.—Thompson *v.* Chicago & A. R. Co., 22 Mo. App. 321.

New Hampshire.—Patrick *v.* Farmers' Ins. Co., 43 N. H. 621.

New York.—Ames *v.* New York Union Ins. Co., 14 N. Y. 253; North British & Mer. Ins. Co. *v.* Cent. Vermont R. Co. (N. Y. Sup. Ct.), 40 N. Y. Supp. 1113; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136.

Ohio.—Portage County Mut. Fire Ins. Co. *v.* West, 6 Ohio St. 599.

Pennsylvania.—North Western Ins. Co. *v.* Phœnix Oil & Candle Co., 31 Pa. St. 448.

Texas.—Gulf, C. & S. F. Ry. Co. *v.* Clarke, 5 Tex. Civ. App. Rep.

Note

547, 24 S. W. 355; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 45 Am. & Eng. R. Cas. 355; Gulf, C. & S. F. Ry. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Gulf, etc., Ry. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; Gulf, etc., R. Co. *v.* White (Tex. Civ. App.), 32 S. W. 323; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Merchants' Mutual Ins. Co. *v.* Lacroix, 35 Tex. 249; Texas & P. Ry. Co. *v.* Alexander (Tex. Civ. App.), 30 S. W. 1113; Texas, etc., R. Co. *v.* Hawkins (Tex. Civ. App.), 30 S. W. 1113.

Vermont.—Wilson *v.* Ætna Ins. Co., 27 Vt. 99; Williams *v.* Vermont Mutual Fire Ins. Co., 20 Vt. 222.

Wisconsin.—Boorman *v.* American Express Co., 21 Wis. 153.

England.—Lewis *v.* Great Western R. Co., 5 Hurlst & N. 867.

Reasonably Shorter Period than Statutory One.—A railroad company, as a common carrier, may lawfully contract with a shipper so as to fix a reasonably shorter time than that allowed by statute within which suit may be filed to recover for loss or damage to freight. So held in Gulf, C. & S. F. R. Ry. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110.

Shorter than Statutory Period—Public Policy.—A shorter period than the statutory period for the institution of suits, by agreement of the parties in their contract, violates no principle of public policy, provided the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage. So held in Brown *v.* Savannah Mutual Ins. Co., 24 Ga. 97.

Three Months after Damage Occurs.—In Ginn *v.* Ogdensburg Transit Co. (C. C. A.), 85 Fed. Rep. 985, it is held that a condition in a bill of lading exempting the carrier from liability for loss or damage, unless "the action in which said claim shall be sought to be enforced shall be brought within three months after said loss or damage occurs," is not forbidden by any rule of law, nor by public policy, and will be presumed to have had the full assent of both parties, and be regarded as reasonable, unless the contrary is established by evidence.

A stipulation in a bill of lading that an action for loss or damage to the freight shipped must be brought within three months after the loss or damage occurs, is just and reasonable, and operates as a bar to an action brought after the expiration of three months from the happening of the loss or damage. So held in Cox *v.* Central Vt. R. R., 170 Mass. 129, 49 N. E. 97.

In North British & Mer. Ins. Co. *v.* Cent. Vermont R. Co. (N. Y. Sup. Ct.), 40 N. Y. Supp. 1113, it is held that a stipulation of a bill of lading that any action thereon must be brought within three months after the loss or damage occurs, is reasonable. See also, Keiser *v.* Hoey (N. Y. City Ct.), N. Y. Supp. 429.

Sixty Days after Damage Occurs—Missouri Statute—Question of Law—Time Consumed by Correspondence.—In Thompson *v.* Chicago & A. R. Co., 22 Mo. App. 321, it appeared that a shipping contract provided that suit should be brought within sixty days after any loss or damage to the freight occurred, or be thereafter forever barred, and that the lapse of time should be conclusive evidence against the validity of the claim in any action brought after that time. It was held that such provision was not contrary to the policy of limitation by the Missouri statute; that when the time limited is specially specified, the courts, as a matter of law, will say whether it is reasonable; that the time consumed by correspondence in regard to the claim did not relieve the shipper of his obligation to bring suit within the specified time; and that the twelve days re-

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maining, after he discovered he could not settle, was a reasonable time in which he might have begun suit, and that he was barred from recovery by the term of such provision.

Forty Days after Right of Action Accrues.—A stipulation in a contract of affreightment that, as a condition precedent to a right to recover against the carrier, suit for damages for loss of or injury to freight must be filed within forty days after the right of action accrues, is valid, and a failure to comply with such condition will prevent a recovery, unless the plaintiff shows that he could not by the exercise of reasonable diligence have brought his action within such period. McCarty *v.* Gulf, etc., Ry. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc., Ry. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 45 Am. & Eng. R. Cas. 353; Gulf, etc., Ry. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171; Galveston, H. & S. A. Ry. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298.

Absence of Knowledge of Damage Not Due to Extraordinary Circumstances.—A condition in a bill of lading, appearing to be in common use, with general acquiescence, and agreed to by the shipper without protest, requiring an action for loss or damage to be brought within three months after it occurs, will not, with respect to the shipment in question and the circumstances shown, be held void as unreasonable, and it cannot be controlled by want of knowledge of the loss or damage, where such want of knowledge is not due to extraordinary circumstances. So held in Central Vermont R. Co. *v.* Soper (C. C. A.), 59 Fed. Rep. 879.

Forty Days Not Shown to Be Unreasonable—Removal of Bar.—A forty days restriction in a shipping contract of the time for bringing suit for injury to cattle shipped, not having been shown to be an unreasonable time, and having expired without action being brought, such bar to an action can be removed by nothing less than an absolute promise, in writing, to pay. So held in Gulf, etc., Ry. Co. *v.* White (Tex. Civ. App.), 32 S. W. 322.

Forty Days—Serving Citation.—But a stipulation that the right to recover for the breach of a contract to carry live stock should be barred unless an action be commenced and citation served within forty days next after the loss or damage shall have occurred is unreasonable. So held in Gulf, etc., R. Co. *v.* Stanley, 89 Tenn. 42, 2 Am. & Eng. R. Cas., N. S., 480, 33 S. W. 109.

And in Gulf, C. & S. F. Ry. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, it appeared that a contract of affreightment provided that suit for damages must be filed and service had within forty days after accrual of the claim for loss of or damage to freight. It was held that as the stipulation as to service was unlawful, and the two acts of filing suit and service of citation being so blended that they could not be separated, the entire provision was void.

2. KENTUCKY DOCTRINE.

Attempt to Vary Statute of Limitations.—A stipulation in a shipping contract that no suit for damage to the freight shall be brought, unless commenced within six months after the loss, is in effect an attempt to vary the statute of limitations, and void as against public policy. So held in Adams Express Co. *v.* Walker (Ky.), 83 S. W. 106. See also, Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Davis *v.* Western Union Telegraph Co., 107 Ky. 527, 54 S. W. 849; Western Union Telegraph Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068.

3. STATUTORY PROHIBITIONS.

Missouri.—Any provision of a contract of shipment which limits

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the time in which an action for injury to freight may be brought, if such limit is less than the time fixed by statute, is void. So held in Richardson *v.* Chicago & A. R. Co., 149 Mo. 311, 50 S. W. 782, 13 Am. & Eng. R. Cas., N. S., 170. This decision is based upon an express statutory provision.

Constitutionality of Statute Declaring Contracts Containing Stipulation Void.—A statute declaring all parts of a contract void that purport to limit the time in which any suit thereon may be brought is not unconstitutional. So held in Karnes *v.* American Fire Ins. Co., 144 Mo. 413, 46 S. W. 166.

Texas Statutes.—Under the Texas Act of March 4, 1891, no stipulation is valid which limits the time in which suits against railroads as carriers of freight may be brought to less than two years. St. Louis South Western R. Co. *v.* Williams (Tex. Civ. App.), 32 S. W. 225, 2 Am. & Eng. R. Cas., N. S., 541, abstr.; Reeves *v.* Texas, etc., R. Co., 11 Tex. Civ. App. 514; Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116; Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Gulf, etc., R. Co. *v.* Elliott (Tex. Civ. App.), 26 S. W. 636.

Texas Statute Applies to Interstate Shipments.—Ch. 17, Acts 22 Texas Legislature, page 20, prohibiting contracts limiting time in which to sue, and prescribing that stipulations for notice of claim of loss for less time than ninety days shall be void, applies to interstate as well as domestic contracts of shipment. So held in Gulf, C. & S. F. Ry. Co. *v.* Eddins, 7 Tex. Civ. App. 116.

4. LIMITATION OF COMMON-LAW LIABILITY—EFFECT OF STATUTORY PROHIBITIONS.

But the fact that a statute prohibits a carrier from limiting its common-law liability by contract does not render a stipulation in a contract of shipment that suit for loss or injury to goods shipped must be brought within a time less than the statutory period invalid. So held in Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 30 Am. & Eng. R. Cas. 49, 4 S. W. 567.

5. FAILURE TO SUE IN TIME CAUSED BY FRAUD OR MISREPRESENTATIONS.

Where the failure to sue the carrier for loss or damage to freight within the time prescribed by the shipping contract has been caused by the fraud or misrepresentations of the carrier or its agent, such stipulation does not affect the shipper's right of recovery. Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 289; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 30 Am. & Eng. R. Cas. 49, 4 S. W. 567, 49 Am. & Eng. R. Cas. 171; Galveston, etc., R. Co. *v.* Kelly (Tex. Civ. App.), 26 S. W. 470.

Induced to Believe Claim Will Be Paid without Suit.—Where, by the conduct of an agent of the carrier railroad, a shipper is induced to believe that his claim for damages to freight will be paid without suit, and for that reason an action is not brought within the time prescribed by the shipping contract, it may be brought after such time. So held in Galveston, etc., Ry. Co. *v.* Kelley (Tex. Civ. App.), 26 S. W. 470.

In Gulf, etc., Ry. Co. *v.* Trawick, 80 Tex. 270, 18 S. W. 948, 15 S. W. 568, it appeared that a shipping contract required suit to be brought within forty days from the time damages to freight occurred. Plaintiff, in replication to a plea of this limitation, the suit not having been filed within the stipulated time, alleged that "within three days after the accrual of the cause of action, and on divers days down to and including Oct. 27, 1884, the defendant by and through its agents represented to plaintiff that the defendant would adjust and

pay his claim for the cattle killed and injured, and induced him to put his claim for much less than the real damage, upon a statement made by defendant, through the local agent of defendant at Lampasas, to the effect that defendant would pay said claim without suit if plaintiff would put it in for a reasonable sum," * * * alleging refusal to pay Oct. 27 and suit filed Nov. 11, 1884. It was held that the replication was sufficient.

In Galveston, H. & S. A. Ry. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298, it appeared that a shipper, who had a claim for damages against the carrier, which the shipping contract required to be sued upon within forty days after the damage occurred, presented his claim before the expiration of such period to the carrier's agent, who forwarded it to the general officers, and, afterwards, within the forty days, when asking the agent about the claim, was requested to wait, and was told that the carrier had written that it would pay the claim. It was held that the trial court properly refused to charge that the fact that the agent received the claim to be forwarded to the general officers would not be a waiver or estoppel on the part of the carrier, but that the shipper must have been deprived of his right to sue by the willful acts and promises of the carrier.

6. MISCELLANEOUS.

Burden of Proof.—The burden of proving the reasonableness of a shipping contract limiting the time within which and action for loss of or injury to freight may be brought is upon the carrier. So held in Texas, etc., R. Co. *v.* Reeves, 90 Tex. 499, 39 S. W. 564, 8 Am. & Eng. R. Cas., N. S., 429.

Consideration—Reduced Rate.—A reduced rate is a sufficient consideration to support a stipulation limiting the time for bringing suit for loss or damage to freight to forty days from the date of delivery to the carrier. So held in Texas, etc., R. Co. *v.* Klepper (Tex. Civ. App.), 24 S. W. 567.

Sufficiency of Answer.—In an action against a carrier to recover for injuries to live stock during transportation, in order for the carrier to avail itself of a stipulation in the contract of shipment limiting the time in which an action may be brought for its breach, it must in its answer allege facts showing that such stipulation was reasonable. So held in Texas P. Ry. Co. *v.* Reeves, 90 Tex. 499, 8 Am. & Eng. R. Cas.. N. S., 429, 39 S. W. 564.

Escape of Stock from Pens Prior to Shipment—Stipulation Not Applicable.—In Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 275, 18 S. W. 948, 15 S. W. 568, it is held that such a stipulation was not applicable to an action for the loss of stock escaping from defective cattle pens while awaiting shipment, but would apply to an action for injuries sustained by the cattle after shipment.

Stipulation Void under Lex Fori.—Where plaintiff, a resident of Montana, contracted in Minnesota with defendant for the transportation of certain cattle from Minnesota, to destination in Montana, and thereafter brought suit in the Montana state courts for damages resulting from delay, which suit defendant removed to the federal Circuit Court sitting in Montana, such court could not enforce a stipulation in the transportation contract providing a sixty-day limitation for an action thereon, which was void under the express provisions of Civ. Code Mont. § 2245, though it was not prohibited by the laws of Minnesota, where the contract was made. So held in Northern Pac. Ry. Co. *v.* Kempton (C. C. A.), 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542, 138 Fed. Rep. 992.

A. R. Y.

CINCINNATI, N. O. & T. P. RY. CO. *v.* COMMONWEALTH.

(Court of Appeals of Kentucky, Oct. 16, 1907.)

[104 S. W. Rep. 771.]

Railroads—Operation—Regulations—Violations—Indictment.*—An indictment charging a railroad company with running its trains through an incorporated town at an unreasonable rate of speed and without the customary warning signal charges a public nuisance.

Same.*—To find a railroad company guilty of committing a public nuisance by running its trains through an incorporated town at an unsafe rate of speed, without signals at a crossing therein, it is necessary, not only to prove an habitual rapid running of the trains, but also that such running was without necessary warnings to avoid injuring those using the crossing.

Same—Negligence.†—The rapid running of a train over the streets or crossings of a town, which will render unavailing signals that may have been given of its approach, is evidence of negligence, entitling a person injured thereby to recover damages.

Same — Municipal Corporations — Police Power — Regulation of Trains.—Ky. St. 1903, § 786, requiring every railroad company to sound the whistle and ring the bell outside of incorporated cities at least 50 rods from a crossing, and to give such signals in cities as the legislative authorities thereof may require, confers on municipalities the exclusive power to determine by ordinance what signals shall be given therein by trains running through their corporate limits, whether on the streets or crossings.

Same.—Under Ky. St. 1903, § 3074, authorizing towns of the sixth class to enact police regulations not conflicting with the general

*For the authorities in this series on the subject of railroads and things pertaining to railroads as nuisances, see foot-note appended to Southern Ry. Co. *v.* Commonwealth (Ky.), 23 R. R. R. 370, 46 Am. & Eng. R. Cas., N. S., 370.

†For the authorities in this series on the subject of the care required of those in charge of trains to avoid injuring other users of streets, see foot-notes appended to Johnson *v.* Louisville & N. R. Co. (Ky.), 22 R. R. R. 658, 45 Am. & Eng. R. Cas., N. S., 658; foot-notes appended to McCabe's Adm'x *v.* Maysville, etc., R. Co. (Ky.), 21 R. R. R. 852, 44 Am. & Eng. R. Cas., N. S., 852.

For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to rate of speed of trains approaching crossings, see foot-notes appended to Illinois Cent. R. Co. *v.* Willis' Adm'r (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312.

For the authorities in this series on the subject of the police powers of a state over railroad companies, see foot-notes appended to State *v.* St. Paul, etc., Ry. Co. (Minn.), 23 R. R. R. 737, 46 Am. & Eng. R. Cas., N. S., 737; foot-notes appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

laws, a town of the sixth class may require a railroad company to use such reasonable precaution as to the speed of its trains in approaching a crossing or passing through its limits as may be needful for the safety of the public.

Same—Evidence—Admissibility.—Where, on a trial of a railroad company for committing a public nuisance by running its trains through an incorporated town at an unsafe speed without giving warning at public crossings, the evidence showed that it stationed a watchman at a crossing, it was proper, as bearing on its good faith, to show that it placed the watchman there pursuant to a requirement of the railroad commissioners, though the commissioners exceeded their authority.

Same—Evidence—Sufficiency.—On a trial of a railroad company for committing a public nuisance by running its trains through an incorporated town at an unsafe speed without giving warning at a crossing, evidence held to require an acquittal, though the trains were run at an unreasonable rate of speed.

Appeal from Circuit Court, Mercer County.
"To be officially reported."

The Cincinnati, New Orleans & Texas Pacific Railway Company was convicted of maintaining a public nuisance, and it appeals. Reversed, and remanded for new trial.

E. H. Gaither and *John Galvin,* for appellant.
N. B. Hays, Atty. Gen., and *Chas. H. Morris,* for the Commonwealth.

SETTLE, J. This appeal is prosecuted from a judgment entered by the court below upon the verdict of a jury finding appellant guilty of committing a public nuisance and fixing its punishment at a fine of $500. The indictment under which the trial was had specifically charges that appellant did "unlawfully, willfully, habitually, and for an unreasonable length of time run its trains at an unsafe and unreasonable rate of speed and so rapidly as to endanger and hazard the safety and life of persons traveling upon the turnpike leading from Harrodsburg to and through Burgin, which was and is a public highway, at a point where said railroad crosses said pike in Burgin, an incorporated town, and at a point where there is much travel in buggies and vehicles and by pedestrians, and this without sufficient and necessary warning to prevent the danger, hazard, and inconvenience to public travel." Appellant filed a demurrer to the indictment, which was overruled, as was its motion for a peremptory instruction, made at the conclusion of the commonwealth's testimony, and motion for a new trial following the verdict and judgment.

According to the evidence Burgin is a town of the sixth class, with a population of about 1,000. Appellant's road runs through it north and south, and the turnpike mentioned in the indictment

is its principal thoroughfare or street, and the only one of the town crossing the railroad. The Burgin post office, school, and churches, as well as its principal business houses, are situated east of the railroad, and its main residence section west thereof. There is a large amount of travel over the crossing during the day, but the night travel is less than a third as great. Each day and night several of appellant's fast trains, both passenger and freight, pass through Burgin without stopping. At and near the crossing are numerous side tracks, which are often occupied by empty or loaded freight cars, both day and night; and when this is the case it is difficult for persons approaching the crossing to see appellant's trains coming from the south. According to the commonwealth's evidence appellant's through trains usually pass Burgin at a speed of 40 to 70 miles an hour. On the other hand, appellant's testimony was to the effect that these trains ran through the town at 25 to 50 miles an hour. The commonwealth's testimony also showed that a watchman was kept at the crossing by appellant from 6 a. m. to 6 p. m. each day, but wholly failed to show that the trains of appellant, in approaching and passing through Burgin, did not give the usual and proper signals, while that of appellant showed that such signals were invariably given; and there was no contrariety of evidence as to the further fact that no one had ever been injured at or near the crossing by appellant's manner of operating its trains.

Appellant's complaint of the trial court's action in overruling its demurrer to the indictment cannot be sustained. If, as charged in the indictment, appellant willfully, habitually, and for an unreasonable length of time ran its trains through Burgin at such a rapid, unreasonable, and unsafe rate of speed as to endanger the lives or safety of persons using the crossing, and this, as in substance further alleged, was habitually done without the customary and necessary warning signals of their approach, these acts were sufficient to constitute the offense charged. In Louisville, Cincinnati & Lexington Railroad Company *v.* Commonwealth, 80 Ky. 143, 44 Am. Rep. 468, an indictment for a common-law nuisance, charged to have been committed by appellant at a crossing of the turnpike and its railroad by "habitually running its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger, hazard, and injure persons traveling upon the turnpike, without giving warning signals or taking precautions to avoid injuring such persons by approaching trains," was held to sufficiently state a public offense. As in language and meaning the indictment in the case at bar is substantially the same as that of the case supra, we are constrained to hold that the demurrer to it was properly overruled.

We are of opinion, however, that the evidence introduced by the commonwealth in this case did not warrant a conviction; for,

in order to find appellant guilty of the offense charged, it was necessary, not only that it should have proved such habitually rapid running of its trains by appellant as was reasonably calculated to endanger or injure persons using the crossing, but also that such running of its trains was without the necessary warning or signals or other precautions to avoid injuring those using the crossing. According to the evidence appellant's trains, in approaching the Burgin crossing, always gave the customary statutory signals, in addition to which appellant took the precuation to keep a watchman at the crossing from 6 a. m. to 6 p. m. each day. This view of the law was adopted by the court in L., C. & L. R. R. Co. *v.* Commonwealth, supra. The opinion, after stating the facts as to the character of the crossing in that case, the obstructions near it, its large and constant use by the traveling public, and the speed at which the railroad company ran its trains in approaching it, proceeds to say: "This evidence clearly establishes the fact that the safety of the numerous persons passing over the crossing requires that warning signals should be given of the approach of trains. The jury by their verdict in effect found that appellant habitually failed to give such signals, and, as they were necessary to the safety of the public from danger of approaching trains, the appellant was legally convicted, unless the finding of the jury is without evidence to support it. There is evidence of the failure to give any warning signals on several occasions, and the testimony introduced by appellant to establish the custom of ringing the bell or sounding the whistle on the approach of trains to the crossing does not show that such signals were universally given, and it lacks some of the elements of certainty." L. & N. R. R. Co. *v.* Commonwealth, 13 Bush, 390.

We have in this state no statute regulating the rate of speed at which railroads shall operate their trains, and while, in civil actions brought by persons for injuries resulting from the alleged negligence of railroad companies, this court has time and again held that such rapid running of a train over the streets or crossings of a town or city as would render unavailing signals that may have been given of its approach was such evidence of negligence as would entitle the person injured thereby to recover damages, it has never undertaken to fix a rate of speed at which trains should be operated in towns or cities, and manifestly could not do so, in the absence of a statute or ordinance authorizing it. Its rulings have gone no further, therefore, than to decide whether the facts of such cases as were brought to it for review did or did not show negligence. The rule announced by this court in civil actions for injuries alleged to have been received on the streets or crossings of a town or city through the negligence of those operating railroad trains is that greater care should be used in running trains on the streets or crossings of a town or city than is required to be exercised in approaching highway cross-

ings in the country, because of the larger amount of travel and constant presence of persons on the streets and crossings. Under such circumstances, in addition to giving and continuing the customary signals and keeping a constant lookout, the trainmen should reduce the speed of the train, so as to lessen the danger of injury to persons on the street or crossing from its movements. McCab's Adm'x *v.* Maysville & Big Sandy Ry. Co., 89 S. W. 683, 28 Ky. Law Rep. 536. On the other hand, the rule as to the degree of care to be used by those in charge of a train in approaching a country crossing is, not that the speed of the train be slackened, but that, where the speed of the train is great, care in giving warning of its approach to the crossing should be commensurate with the danger to be avoided. L. & N. R. R. Co. *v.* Molloy's Adm'x, 28 Ky. Law Rep. 1113.

But, in order to sustain a penal prosecution against a railroad company for running its trains in city or county at a high or even dangerous rate of speed, either upon a street or in approaching a crossing, it must be shown that such running of the trains was attended with a failure on the part of those operating them to give the necessary and usual signals of their coming. Section 786, Ky. St. 1903, provides: "Every [railroad] company shall provide each locomotive engine passing upon its road with a bell of ordinary size and steam whistle, and each bell shall be rung, or whistle sounded outside of incorporated cities and towns of a distance of at least fifty rods from the place where the road crosses upon the same level any highway or crossing, at which a signboard is required to be maintained, and such bell shall be rung or whistle sounded continuously or alternately, until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require." It will be observed that the last clause of section 786 confers upon the legislative authorities of all cities and towns of the commonwealth the exclusive power to determine and by ordinance declare what signals shall be given therein by trains running through their corporate limits, whether upon the streets or crossings. In Chesapeake & Ohio Railway Company *v.* City of Maysville, 69 S. W. 728, 24 Ky. Rep. 615, the validity of an ordinance of the appellee city compelling the appellant railway company to erect and maintain gates at certain crossings in the city was attacked upon the ground that it was unconstitutional and its enforcement would amount to usurpation on the part of the city of power vested by law in the railroad commissioners and which could be exercised by them alone. Both contentions were rejected by this court; the opinion declaring that the charter of Maysville, a city of the fourth class, expressly authorized the enactment of the ordinance, and, in addition, that section 774, Ky. St. 1903, under which the power in question was claimed for the railroad commissioners, only authorize them to compel the erec-

tion and maintenance of gates at highway crossings within a mile of the corporate limits of any city or town of this commonwealth.

Not only may the town of Burgin, under the power conferred by section 786 of the Statutes, *supra,* by ordinance require appellant to adopt such signals as may be reasonably necessary to give warning of the approach of its trains to the crossing in question, but it may require of it such other reasonable precautions as to the speed of the trains in approaching the crossing or passing through the corporate limits of the town as may be needful for the safety of the public; for a town of the sixth class, like Burgin, is by the provisions of subsection 7, § 3704, Ky. St. 1903, empowered through its board of trustees "to * * * enact and enforce within the limits of said town all other local, police, sanitary and other regulations as do not conflict with the general laws." While, in requiring appellant to keep a watchman at the Burgin crossing, the railroad commissioners may have transcended their authority, it was a precaution which inured to the benefit of the citizens of that town. The testimony as to the stationing of the watchman at the crossing and the purpose thereof having properly been admitted by the court, we do not think it would have been improper to admit the testimony offered by appellant to the effect that in placing the watchman at the crossing it acted upon a suggestion or requirement of the railroad commissioners, as it tended to show appellant's good faith in attempting to protect persons using the crossing against the dangers arising from the passing of its trains. We do not mean to say that appellant should have been acquitted because of the failure of Burgin's board of trustees to adopt an ordinance with respect to the signals to be given by appellant's trains in approaching the crossing, or running through the town; but as, according to the evidence, appellant's trains in approaching the Burgin crossing universally gave the warning signals required by statute in respect to crossing outside of incorporated towns and cities, and it in addition kept a watchman at the crossing each day during the hours mainly devoted to travel on the turnpike and crossing, these facts, in the absence of an ordinance of the town of Burgin requiring other than the statutory warning signals from appellant's trains in approaching the crossing, entitled appellant, notwithstanding the fast running of its trains, to an acquittal at the hands of the jury. We are of opinion, therefore, that the trial court, after the introduction of all the testimony, should have peremptorily instructed the jury to find appellant not guilty.

For the reasons indicated, the judgment is reversed, and case remanded for a new trial and other necessary proceedings consistent with the opinion.

GERMANUS *v.* LEHIGH VALLEY R. CO.

(Court of Errors and Appeals of New Jersey, June 21, 1907.)

[67 Atl. Rep. 79.]

Master and Servant—Injuries to Servant—Evidence.*—Plaintiff's intestate was one of a gang of men employed by the defendant company on its tracks tamping ties. The evidence at the close of plaintiff's case proved a custom that the men should be warned by the boss or foreman of the approach of a train, and that the plaintiff's intestate was run down and killed because of the failure of the foreman to give such warning. Held, that upon such uncontradicted proof a motion to nonsuit was rightfully denied. The decedent had the right to rely upon such warning being given in case there was any danger from approaching trains.

Same—Negligence of Foreman—Liability of Master.†—Where the custom of giving a warning by the foreman its proved, it is embraced in the duty owed by the master to the servants, and for the failure of the foreman properly to discharge that duty the master is responsible.

Same—Questions for Jury.—Where unusual conditions are shown to exist, such as the passing of noisy freight trains, which may interfere with the servants hearing the customary warning or signals, it was properly left to the jury to say whether, under such unusual conditions, the customary warnings were sufficient.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Emil Germanus, as administrator by Michael Marcincsak, against the Lehigh Valley Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

McCarter & English, for plaintiff in error.
Thomas L. Raymond, for defendant in error.

VROOM, J. The plaintiff's intestate was one of a gang of la-

*For the authorities in this series on the subject of the right of an employee to assume that his master, or his representative, has performed, or will perform, the duties owing to him, see foot-notes appended to Southern Ry. Co. *v.* Simmons (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to Chicago, etc., Ry. Co. *v.* Riley (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to Wiest *v.* Coal Creek R. Co. (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

†For the authorities in this series on the question whether a foreman is a fellow servant of a hand working under him, see foot-notes appended to Chicago, etc., R. Co. *v.* Kimmel (Ill.), 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to Jemming *v.* Great Northern Ry. Co. (Minn.), 19 R. R. R. 697, 42 Am. & Eng. R. Cas., N. S., 697.

borers in the employ of the defendant company. They were working on the day of the accident on the main line of the defendant's railroad between Elizabeth and Roselle, and were engaged, under the direction of one Kutora, as foreman, in tamping ties. The track at that point to the west is directly straight for over a mile. The plaintiff's intestate was working on the east-bound track, facing Elizabeth, with his back toward the direction from which trains would come. He was killed by being run down by a special engine running on the said east-bound track, and when he was struck was bending forward working with his pick. The men constituting the gang were strung out in a line on the said track. The deceased was working standing with his back to the appoaching engine, and was the third in the line. The foreman, Kutora, was some eight or nine steps from him. About the time of the accident, a long, empty, and noisy freight train was passing on the west-bound track, along side of the place where the men worked. The engine which ran down and killed plaintiff's intestate was in use by the officials of the road on a tour of inspection, and was returning from such a trip, and had on board certain officers of the company. It was claimed by the engineer that the bell was rung and the whistle blown from Roselle until the deceased was struck. The testimony on the part of the plaintiff was that no signals were given of the approach of the engine. According to the evidence of the plaintiff's witnesses, it was the custom of the foreman to call out to the men to look out on the approach of trains, and even to push them away if they did not move in time, but that on this occasion no warning at all was given by the foreman. The foreman, Kutora, testified that he had given two warnings, and was corroborated by one of the gang of men.

At the close of the plaintiff's case a motion was made for a nonsuit, which was denied by the learned trial justice, and this refusal forms the basis for the first error assigned. The ground urged in support of the motion was "that the place where the plaintiff's intestate was working was one of obvious danger, and that he can only escape from the liability that comes from occupying such a position, in a suit against the master, upon substantial proof of the existence of a custom on the part of the company to notify the employees, so situated as the decedent in this case was, of the approach of a train, and that there is no proof of the custom of giving warning by the boss or foreman." I think the motion to nonsuit was properly denied. As the case stood when the case for the plaintiff was closed, there was proof uncontradicted that it was the custom of the company by its foreman to warn men working on the tracks, as this gang were, of the approach of trains, and that in this particular instance the warning was not given. The deceased had the right to rely upon such a warning being given, in case there was any danger from

approaching trains. D'Agostino *v.* Penna. R. R. Co., 72 N. J. Law, 358, 60 Atl. 1113. It was correctly held in that case that where a workman in the discharge of his duty has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning is given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided by the court. Albanese *v.* Penna. R. R. Co., 70 N. J. Law, 241, 57 Atl. 447; Harmer *v.* Reed Apartment Co., 67 N. J. Law, 332, 53 Atl. 402. This case is distinguished from the recent decision of this court in Precodnick *v.* Lehigh Valley R. R. Co., 65 Atl. 1047. There the necessity of the giving warning to the men while working together as a gang, under the custom of system proved, was held part of the duty owed by the company to them; but it appeared that the deceased in that case was working at a distance from the gang, and the custom was clearly shown that when so sent out by himself it was incumbent upon the workman to look out for his own safety; the distinction clearly being that in the case now under consideration he had the right to expect a warning, while in the Precodnick Case he had not such a right, by reason of the system under which he was working.

It was further sought to sustain the motion for a nonsuit upon the ground that the foreman, Kutora, was a fellow servant with the plaintiff's intestate. While this point was not included in or strictly raised by the motion for nonsuit, yet it was clearly present in the mind of the trial judge. He said, in denying the motion: "As I understand the rule laid down by our cases, Kutora was not acting as a fellow servant of the deceased, but was the representative of the master, performing the master's work, and for his failure the master is responsible. His failure is not in that regard the failure of a fellow workman." The rule laid down in this court in Bellville Stone Co. *v.* Mooney, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834, controlling this question, is too well settled to call for any further discussion. In that case Mr. Justice Dixon said: "That the giving of warning was embraced in the duty owed by an employer to his employees; that the place where he sets them to work shall be kept safe; that the failure of the foreman to perform this duty carefully was imputable to the employer; that such failure was not one of those obvious dangers of which the employee assumed the risk." D'Agostino *v.* Penna. R. R. Co., *supra.*

The other assignments of error were based upon exceptions taken to the charge of the trial judge. The second, third, and seventh exceptions were argued together. They were as follows: "(2) All that the defendant was obliged to do was to use reasonable care to see that customary warning was given of an approaching engine. If the jury believe that the noise of a passing

freight train on the west-bound track interfered with the plaintiff hearing such signals or warning, the plaintiff cannot recover. (3) Any increased danger arising from the presence of a noisy freight train, and the consequent difficulty in hearing the signals or warning of an approaching engine, was a risk assumed by the decedent. The railroad company was not bound to increase or change its customary call or warning by reason of the accidental presence of a freight train making a noise on the west-bound track." "(7) For any difficulty in hearing the warning of the foreman, if any were given, arising from the fact that a train of empty coal and freight cars was passing by, the company was in no wise responsible."

It was insisted upon the part of the plaintiff in error that these requests raised the question whether the passing of the freight train and its attendant noise fastened an additional burden on the defendant to bring home its warning to the workman, or did it impose an additional duty on the decedent to be on his guard in the presence of the increased danger? These requests the trial judge declined to charge, and very properly said it was for the jury to say whether the customary warning was enough under the unusual conditions which existed. In his charge, after referring to the fact that the giving of a warning is embraced in the duty owed by the employer to the employee he said: "If you find that this signal was not given by Kutora in a way to warn these workmen soon enough to enable them safely to escape, then there is another question which you must determine adversely to the railroad company before you can fasten the responsibility upon them; and that is this: Was the blowing of the whistle of this train and the ringing of this bell continuously a discharge of the duty which this railroad company owed to this decedent? That is, to use reasonable care for his protection while he was at work on that track? Now, it would seem to me that, ordinarily, nothing could be more effective to warn a man working upon a railroad track of the fact that a train was approaching than by the continuous blowing of the whistle on the engine. It is for you to say whether that is a full performance of the company's duty under all conditions. Were the surroundings such that the blowing of the whistle could not be heard by these men, notwithstanding the continuity of its blowing? The testimony is that they all kept on at work on this track until the engine was close upon them. Did the freight train which was passing at the time drown the noise of the whistle until the engine was close upon these men? If it did, then that warning was not effective. The fact that it was not effective is not conclusive negligence on the part of the railroad company. Ought they to have anticipated that, under the conditions existing at that time and place, that warning would not be one which would be heard by these men?" The subject of the warnings was thus fairly

placed before the jury, and there was no error in leaving it to their determination.

The other assignments of error relied upon by the plaintiff in error were based upon the fourth and fifth requests to charge. The fourth request was "that if the company gave warning or signal of the approaching engine, and the decedent hesitated or delayed obeying, and thereby was killed, there can be no recovery." To have charged this request would have amounted to a determination, as a matter of law, that any hesitation or delay in obeying amounted to contributory negligence, and would have defeated the action, and was properly refused. The question of contributory negligence was correctly submitted to the jury; the trial judge in his charge saying: "If you say that the warning was given in such a way that he must have heard it, if he had been paying the attention which he, as a prudent man, is required to pay, working in a place of danger and knowing the system which is adopted for his safety, then the railroad company is in no default in the performance of the duty which it owed to him of taking reasonable care for his safety, and the plaintiff could not recover."

The fifth request was as follows: "No duty was cast upon the defendant to pull the decedent off the track; nor was the defendant bound to have a foreman near enough to every workman as that his warning should be heard by each, in addition to giving the customary warning by bell or whistle, or both." The trial judge declined to charge this request, saying that it had injected into it a statement not warranted by the proof; that is, that the warning customarily given to laborers on the track of an approaching engine or train was by whistle or bell, and that there was no proof that any such signal had ever been given before; and, when it is considered that the evidence tended to show that the warning by the boss or foreman was the customary warning, it cannot be said, as a proposition of law, that the company did not owe the duty to this man to have the foreman near enough to the workmen so that his warning could be heard by each.

I find no error in the record, and the judgment brought up should be affirmed.

COONEY *v.* COMMONWEALTH AVE. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, June 18, 1907.)

[81 N. E. Rep. 905.]

Master and Servant—Injuries to Servant—Duty of Master.*—An employer by the contract of employment impliedly undertakes to provide the employees with suitable appliances and a safe place in which to work and to use reasonable diligence in employing competent servants.

Same—Fellow Servants—Incompetency—Liability of Master.—Where a servant originally competent becomes during the service incompetent, and the incompetency is known, or in the exercise of reasonable diligence should have been discovered, and the employment is continued, the master's liability is the same as if he had knowingly or negligently hired an incompetent servant.

Same—Evidence—Admissibility.†—In an action by an employee for injuries caused by the incompetency of a fellow servant, single instances of incompetency of the fellow servant are inadmissible; but his general reputation as a person deficient in skill in performance of his duties is admissible.

Same—Knowledge of Master of Incompetency of Servant.‡—The knowledge of the assistant superintendent of a street railway com-

*For the authorities in this series on the subject of the care required of a railroad company, as an employer, to furnish safe appliances, see foot-notes appended to Shandrew *v.* Chicago, etc., Ry. Co. (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; Moore *v.* Southern Ry. Co. (N. Car.), 22 R. R. R. 635, 45 Am. & Eng. R. Cas., N. S., 635; foot-notes appended to Collins *v.* Louisville & N. R. Co. (Ky.), 22 R. R. R. 78, 45 Am. & Eng. R. Cas., N. S., 78; foot-notes appended to McGregor *v.* Pennsylvania R. Co. (Pa.), 22 R. R. R. 76, 45 Am. & Eng. R. Cas., N. S., 76; Vissman *v.* Southern Ry. Co. (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; foot-notes appended to Denver & G. R. Co. *v.* Burchard (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361.

For the authorities in this series on the question of the care required of a railroad company in furnishing an employee a safe place to work, see foot-notes appended to McGregor *v.* Pennsylvania R. Co. (Pa.), 22 R. R. R. 76, 45 Am. & Eng. R. Cas., N. S., 76; foot-notes appended to Norfolk & W. Ry. Co. *v.* Gesswine (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553; foot-notes appended to McTagart *v.* Maine Cent. R. Co. (Me.), 19 R. R. R. 240, 42 Am. & Eng. R. Cas., N. S., 240.

†See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

‡For the authorities in this series on the question whether the knowledge of a railroad employee is notice to his company, see foot-notes appended to Louisville & N. R. Co. *v.* Wyatt's Adm'r (Ky.), 20 R. R. R. 413, 43 Am. & Eng. R. Cas., N. S., 413; Chicago & A. Ry. Co. *v.* Waters (Ill.), 20 R. R. R. 166, 43 Am. & Eng. R. Cas., N. S., 166.

pany, charged with the duty of supervising the operation of cars, that a motorman was incompetent and would not be able to run a car properly, which knowledge was communicated to the superintendent, must be imputed to the company.

Same—Incompetent Fellow Servant—Liability of Master.—An employee, seeking to recover for injuries sustained in consequence of the incompetency of a fellow servant retained by the employer with knowledge of the facts, must not only prove prior incompetency of the fellow servant, of which the employer could have had knowledge, as well as the retention by the employer of an incompetent servant, but also that the accident resulting in the injury complained of was occasioned by such incompetency.

Same—Evidence—Sufficiency.—In an action by a street car conductor for injuries received in consequence of the incompetency of the motorman operating the car, evidence examined, and held to justify a finding that the accident was due to the motorman's lack of ordinary skill.

Same.—An employee, seeking to recover from his employer for personal injuries, who introduces testimony from which a single ground of negligence on the part of the employer may be found, is under no obligation to go further.

Same—Question for Jury.—In an action by a street car conductor for injuries sustained in consequence of the incompetency of the motorman in charge of the car, evidence examined, and held, that the question whether the conductor assumed the risk arising from the incompetency of the motorman was for the jury.

Same—Instructions.—An instruction, in an action by a street car conductor for injuries caused by the incompetency of the motorman, that the motorman was required to exercise the degree of care called for under the circumstances, and if there had been only one passenger, the conductor, the duty imposed would have been reasonable care with reference to the circumstances, while with reference to passengers the motorman was called on to exercise the highest degree of care consistent with the performance of his duties, was not erroneous, as leading the jury to believe that the conductor was to be considered a passenger, requiring the company to exercise the highest degree of diligence.

Trial—Instructions—Requests—Necessity.—Where, in an action by a street car conductor for injuries caused by incompetency of the motorman, the company deemed that a charge might have led the jury to consider that the question was one involving the motorman's due care, rather than that of his incompetency, it was the duty of the company to ask for more specific instructions.

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Action by James J. Cooney against the Commonwealth Avenue

Street Railway Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

Vahey, Innes & Mansfield, for plaintiff.
Walter I. Badger, George A. Drury, and *Wm. Harold Hitchcock,* for defendant.

BRALEY, J. By its contract the defendant impliedly undertook to provide the plaintiff with suitable appliances, to furnish a safe place in which he could perform his work according to the nature of the service, and to use reasonable diligence in employing competent fellow servants for the performance of their respective duties. Snow *v.* Housatonic R. R. Co., 8 Allen, 441, 85 Am. Dec. 720; Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605. If originally competent, but during service a servant becomes incompetent, and such incompetency either is known, or in the exercise of reasonable diligence should have been discovered, then, where the employment is continued, the master's liability remains the same as if he knowingly, or negligently, had hired him in the beginning. Gillman *v.* Eastern R. R. Co., 13 Allen, 433, 441, 90 Am. Dec. 210. Upon the trial of such an issue single instances of inefficiency are inadmissible, but the servant's general reputation as a person deficient in skill in the performance of the service for which he was engaged is admissible. Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807; Connors *v.* Morton, 160 Mass. 333, 35 N. E. 860; Palmer *v.* Coyle, 187 Mass. 136, 139, 72 N. E. 844. While the previous experience of one Mead, when the plaintiff claims to have been an unfit servant, is not disclosed, there was evidence that having been employed by the defendant, after receiving instructions from the assistant superintendent, he began as a motorman to operate cars independently. It presently was rumored among the employees, that he was incompetent, and the defendant's assistant superintendent, whose particular duty required him to supervise the proper operation of the cars, testified that, from observation, he had become satisfied that Mead "would never be able to run a car properly." The result of this observation having been reported by him to the superintendent, both of these agents of the defendant knew that by his conduct Mead had shown unfitness for the duties of his position, and their knowledge must be imputed to the defendant. O'Connor *v.* Adams, 120 Mass. 427; Palmer *v.* Coyle, *ubi supra.*

But while there was evidence of prior inefficiency, of which the defendant could have been found to have had knowledge, as well as the retention of an unfit servant, the plaintiff cannot recover unless it also appeared that the accident was occasioned by his incapacity. See Albro *v.* Agawam Canal Co., 6 Cush, 75; Curran *v.* Merchants' Mfg. Co., 130 Mass. 374, 375, 39 Am. Rep. 457. Upon this question the uncontroverted testimony makes it

evident that, in the blasting of rock caused by the construction of a sewer in the vicinity, boulders had been thrown upon the track of the defendant's railway. Because of this obstruction the assistant superintendent directed Mead and the plaintiff, who respectively were acting as motorman and conductor, to change from the car they were running, and complete the transit by taking another car then waiting on the futrher side. The change was accordingly made, and, having proceeded to the end of the route, their positions were reversed, and the car started on the return trip. When it approached the place where under the arrangement it should have stopped, the car continued on its course, and ran directly into the boulder, causing the plaintiff's injuries. If of average intelligence, it must be presumed that the motorman, being aware that they were to change cars as before, knew if the car kept on there must be a collision, and that in its proper management to prevent this the motive power would have to be disconnected, and the brake applied, at a certain distance from the point where it should have been stopped. A failure to accomplish this object, with a straight track, which did not appear to have been otherwise than in good condition, and with a car the mechanical and electrical equipment of which was not shown to have been defective, when considered in connection with his reputation, was evidence that the accident was due to a lack of ordinary skill. Having introduced testimony from which on a single ground its negligence could be found, the plaintiff was under no obligation to go further, and if either the track or the car was defective, thereby causing the collision, as the defendant suggests, it offered in evidence no proof that such conditions existed. Melvin *v.* Pennsylvania Steel Co., 180 Mass. 196, 62 N. E. 379; Droney *v.* Doherty, 186 Mass. 205, 208, 71 N. E. 547.

It is further argued that the plaintiff, having heard of the disqualification of Mead, must be held to have assumed any risk of injury which might follow therefrom while they were engaged in the prosecution of their common employment. After the plaintiff had been employed, the motorman was hired, and there being no assumption of risk by contract, if assumed at all it must have been by conduct. O'Maley *v.* So. Boston Gaslight Co., 158 Mass. 135, 136, 32 N. E. 1119, 47 L. R. A. 161. On the morning of the accident, after having ascertained that Mead was to accompany him, the plaintiff asked for another motorman, and, being refused by the "starter" in charge of the dispatching of cars, he then requested that some one else should go as conductor. This request also having been denied, the plaintiff then took his place on the car. But while the jury could find that he knew of the rumored incompetency of Mead, such knowledge alone would be insufficient, for they also could find that he had not been informed of the extent of his incapacity, and hence did not fully appreciate a danger whose existence was caused solely

by the defendant's fault. An apprehension by the plaintiff that the motorman might be careless in the ordinary management of the car might be found not to include necessarily a forecast that, after an explicit order to stop at a certain point to avoid an obstruction plainly visible on the track, he would be incapable of obedience, and heedlessly cause a collision. Under such circumstances it cannot be held as matter of law that a servant voluntarily takes the risk of the subsequent accident, as the conduct of the servant also must be found to have been accompanied by a voluntary purpose to expose himself to a danger which he appreciates. It, therefore, became a question of fact for the jury to determine under proper instructions whether the plaintiff voluntarily placed himself in this position. Mahoney *v.* Dore, 155 Mass. 513, 519, 30 N. E. 366; Wagner *v.* Boston Elevated Ry. Co., 188 Mass. 437, 440, 441, 74 N. E. 919, and cases cited; Urquhart *v.* Smith & Anthony Co., 192 Mass. 257, 263, 78 N. E. 410; Williams *v.* Birmingham Battery & Metal Co. [1899] 2 Q. B. 338, 344, 345.

The defendant's first and second requests for rulings were properly denied, while the third was given, although not in the language requested. Its exceptions to the instructions on the assumption of risk having been waived, the remaining exception relates to those given concerning the negligence of the motorman. The defendant construes this portion of the charge as stating that the plaintiff was to be considered a passenger in whose transportation the defendant as a common carrier must exercise the highest degree of diligence commensurate with its undertaking. But as a whole it is not susceptible of this meaning. The jury were first told that Mead was required to exercise the degree of care called for under all the circumstances of the case. The presiding judge then continued: "If there had been only one passenger, this plaintiff, * * * the duty imposed * * * would have been ordinary care, reasonable care with reference to all the circumstances of the case; but with reference to passengers he was called upon to exercise the highest degree of care consistent with the performance of his duties. Did he exercise reasonable care?" In referring to the plaintiff as if he had been the sole passenger, there was no modification of his first instruction, and, having alluded to his further duty, the judge closed with a restatement of the rule previously given, that the burden was upon the plaintiff to satisfy them that at the time of the accident the motorman failed to exercise such reasonable care as the conditions demanded. Although the defendant would not be liable to the plaintiff for Mead's negligence if caused solely by want of ordinary care, it was responsible when caused by unskillfulness, and his conduct at the time of the accident was material, for if due care was found the plaintiff could not recover. The entire charge is not reported, and if the defendant was ap-

prehensive, as it now contends, that under the portion already considered the jury might have deemed the question of his due care, rather than that of his incompetency, as decisive, it should have asked for more specific instructions. Wright *v.* Wright, 139 Mass. 177, 29 N. E. 380.

Exceptions overruled.

BEEBE *v.* ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 2, June 11, 1907.)

[103 S. W. Rep. 1019.]

Master and Servant—Action for Injuries—Evidence—Sufficiency.—In an action by a motorman for injuries sustained by the explosion of the controller on a street car, expert proof held not to show the cause of the explosion to be the defective condition of the controller or the want of necessary inspection.

Same—Burden of Proof.*—Where, in an action by a motorman for injuries sustained by the explosion of the controller on a street car, it was alleged that the railroad company was negligent in that the defective condition of the controller could have been discovered by ordinary care in inspecting the same, the burden was on the motorman to show that the controller was defective to the knowledge of the railroad company, had it exercised ordinary care; no presumption of negligence arising from the happening of the accident.

Same—Presumptions—Res Ipsa Loquitur.*—The doctrine of res ipsa loquitur is inapplicable where an injury has resulted to a motorman by the explosion of the controller on a car; that doctrine being inapplicable where injuries result from complicated machinery.

Appeal from Circuit Court, Boone County; Alex. H. Waller, Judge.

Action by David W. Sills against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Sills having died, the cause was revived in the name of his administrator, Frank O. Beebe. Reversed.

Boyle & Priest and *Edward T. Miller,* for appellant.
Richard F. Ralph and *Barclay & Fauntleroy,* for respondent.

BURGESS, J. This is an action for damages for personal in-

*For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see foot-notes appended to Eliot *v.* Kansas City, etc., R. Co. (Mo.), 24 R. R. R. 740, 47 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to Southern Ry. Co. *v.* Carr (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

juries, and was instituted by David W. Sills, the original plaintiff herein, against the defendant in the circuit court of the city of St. Louis. The venue of the cause, upon application of the plaintiff, was changed to the circuit court of Boone county, at the June term, 1904, of which court, upon trial had, a verdict and judgment in the sum of $15,000 was rendered in favor of plaintiff. Defendant's motion for a new trial was overruled, and defendant appealed. Since the said judgment was rendered, David W. Sills, the original plaintiff, died, and the cause was revived by consent in this court in the name of his said administrator.

It is stated in the petition that on December 12, 1902, defendant was engaged in operating a system of electric railways in the city of St. Louis; that plaintiff was in the employ of defendant, and on the last-mentioned date had been assigned by defendant to duty as motorman, and plaintiff was engaged in his duties on defendant's car No. 1,921, which was north-bound on Grand avenue near the Grand avenue bridge about 5:45 o'clock a. m., when a sudden explosion took place within the controller box of said car. Said controller box was an appliance fastened to said car on the front platform. It contained machinery used to apply and regulate and to cut off the electrical force which constituted the motive power of said car. Said machinery was hidden from view in said box, and was operated by a controller lever on the top (outside of said box). It was part of the duty of plaintiff as such motorman to manipulate said lever on said controller in order to set said car in motion and to regulate its momentum, and to stop said car, as occasion might require, in the operation of said car, for the purposes of defendant's business as a carrier of passengers on its said line of street railway. Plaintiff was then and there ignorant of the construction and interior arrangement of said machinery so used to operate said car, and plaintiff's duties as motorman for defendant did not require him to have any knowledge of said machinery within said box, but merely to move said controller as aforesaid in the operation of said car. Said explosion of said controller box on said day, December 12, 1902, was due to the omission of defendant to use reasonable and ordinary care to maintain said controller and the machinery within it in a reasonably safe condition for use by plaintiff as motorman upon said car, as aforesaid, and to defendant's omission to use ordinary care to take reasonable precautions to have the operation of the electrical power in and upon said machinery ordinarily safe for employees, required to use same in the manner in which plaintiff was using said instrument as aforesaid at the time of said explosion, which manner of use was that necessarily incident to the duty of motorman on said car then and there; and said injury to plaintiff was further due and directly ascribable to defendant's omission to use ordinary care to provide reasonably safe machinery for use in operating said motive power

as aforesaid. Plaintiff avers that said appliance which exploded as aforesaid was defective and not reasonably safe, and such defective condition thereof at and prior to said explosion was wholly unknown to plaintiff, and could not have been discovered by plaintiff by the use of ordinary care on his part; but the said dangerous and defective condition of said machinery which exploded could have been discovered by defendant by ordinary care in inspecting said controller prior to its explosion in ample time to have prevented said explosion. Plaintiff further states that by reason of said explosion he was immediately thrown from the said car into the street and sustained severe injuries. The injuries and damages alleged to have been sustained by plaintiff as a result of the explosion are enumerated in the petition, and include bodily injury, loss of time and earnings, a permanent impairment of earning capacity, liability for medical expenses and treatment, and plaintiff prays for judgment on account of such damages in the sum of $30,000. The answer was a denial of each and every allegation in plaintiff's petition contained.

The evidence showed that plaintiff, David W. Sills, was a motorman on one of defendant's street cars on the Bellefontaine line; that while in the discharge of his duty on the front platform of the car there occurred an explosion of the electrical controller thereon which was so violent that Sills was thereby blown or thrown entirely off the car, and he fell upon the pavement or sidewalk on the Grand avenue bridge over which the car was passing at the time. He was unconscious when picked up after being thrown from the car. His left thigh bone was found broken, his right shoulder dislocated, and the muscles torn between the elbow and shoulder. Three of his ribs were fractured, and he also sustained internal injuries, as well as an impairment of his hearing. The left leg was permanently deformed, and rendered an inch and a half shorter than the other leg. As results of his injuries he suffered great pain, and was also afflicted with nervousness, insomnia, loss of appetite, and melancholia. Before he was injured he was in good health and had no deformity of any kind. He was 28 years of age at the time of the accident, and was earning as motorman between 12 and 14 dollars per week. He had been unable to resume work since the time he was injured. Sills testified that he had no technical knowledge of the controller box or the electrical appliances on the car, and had received no special instruction from defendant or from any other source as to any machinery inside of the controller, except that he was shown by two of defendant's employees, before he began his duties as a motorman, "how to cut out the motor if one should break down." He received instruction as to the manipulation of the lever on top of the controller box by the moving of which to the right or left the speed of the car might be accelerated or retarded, and stated that on the top of the controller were marks

or points which would indicate the extent of the power; that seven of such points were visible and two not visible. When asked to state what happened when the so-called explosion took place, and what he did, he explained that the car, without any power on, had been going down hill from Chouteau avenue toward the bridge, and that as there was a rise as the bridge is approached the car begins to check up. "As it began to check up I began to put the power on at the regular rate, and about the time I hit the fifth point I could tell then that something was wrong, but it was so quick I don't know anything about how I got off or anything, only that I was picked up on the bridge. I knew enough to know that I was shocked, and that was all. The car had shocked me a number of times before that after we came from the sheds, but not strong enough to knock me down." He was asked to state what he saw, if anything, in the way of arcking, or any display in the way of an explosion, and he replied: "It was so quick I didn't see anything. In fact, I hardly realized anything of it. I have a slight remembrance of a flash of light as I got the shock, but that was all." Witness said that he had been in the employ of the defendant company about three months, and was not confined to the use of any one particular car; that the motorman didn't have anything to do with the machinery of the car, or the car itself, after the daily run was finished and the car was returned to the shed. Being asked to state what method of inspection or examination of the controller boxes existed in the car shed from whence he took his car on the morning of the accident, witness answered: "The only inspection system I saw there was, where a car had to be fixed, where it had a bad break, the light wire was bad, or anything was wrong when you got done with it, and was ready to put it away for the night, you marked on a book showing what was the matter with the car. That is the only inspection system I knew of." The motorman, he said, would write down what was wrong with the car on a book in the office after bringing the car in for the night, which book was expressly provided for that purpose. He had experienced, as motorman, some slight shocks before, and at one time, as the result of a shock, he lost hold of the lever in going over a switch; that he was knocked over for two seconds perhaps, but that was all; that he had received on the morning of the accident some slight shocks on the way down to the Grand avenue bridge, but that he did not stop to examine into the cause as the motormen were not allowed to do so; that motormen on street cars frequently receive shocks of that kind operating the cars, and that sometimes they pay attention to it, and sometimes not. He did not notice that morning, prior to the time of the accident, any arcking or flame about the motor, only that there was a little puff of smoke at one time.

After plaintiff was injured he was taken to the City Hospital at St. Louis, where he was treated by Dr. Culbertson. He staid

there nearly three weeks, and was then taken to the St. Louis Hospital and treated there by Dr. C. C. Raines. He remained at the latter hospital from New Year's Day till March 23d, and then removed to 1616 Franklin avenue, where he continued to receive medical treatment, and was still under treatment at the time of the trial. Plaintiff belonged to a hospital association, and by reason of his membership therein his expenses for medical treatment at the St. Louis Hospital amounted to but 50 cents a month. He was charged nothing at the City Hospital. For medicines which he obtained at drug stores he paid $8 or $10. Dr. Raines, who had been treating the plaintiff, testified at the trial and explained the nature of plaintiff's injuries, some of which he regarded as permanent, and stated that the injury of his ribs would render his susceptible to lung, and other pulmonary trouble. The reasonable value of his medical and surgical services to Mr. Sills, including the hospital treatment, was, he said, about $226.

Herman F. Pabish testified for the plaintiff, and stated that he was an electrical and mechanical engineer, and was in the employ of defendant about the 20th of December, 1902, and had been so employed since the organization of the company about four years before that time; that he was acquainted with the mechanism of the controller, and the connection by which the electric power was applied to the motor of said cars; that the defendant was using different kinds of controllers, one being manufactured by the General Electric Company and the other by the Westinghouse, and that all controllers were of the same general character. Witness identified a picture of a controller in use by defendant, and by means thereof illustrated and explained to the jury how the electrical force was applied, increased, or diminished. The conditions present at the time when plaintiff was injured were embraced in a hypothetical question put to the witness, who was asked to state what would cause a disturbance or explosion similar to that mentioned as having occurred when plaintiff was hurt. His answer was that it might be caused by dirt, water, or grease, or any other foreign substance almost, in the controller, and he expressed the opinion that, in order to keep the controllers in good condition, the door or part of the casing of the controller should be opened up every day, and the mechanism cleaned. He further stated that it would be a mere accident if an explosion should occur in the controller through an increase of the voltage from the amount usually carried, and that if there was a defect in the controller not detected at the factory, or if it had been used for a long time, an explosion or arcking might occur if the voltage of the electric current were increased beyond the actual capacity; that if there was but a slight imperfection in the condition of the machinery from dirt or other foreign substance being there, or if the contacts were imperfect, and

the full extent of the mill voltage turned on, it would be more likely to produce arcking and a severe shock than if the conditions were perfect as to machinery and points of contact. Witness could not say just what did cause the particular arcking on the occasion of the accident, and all he could do would be to enumerate a list of things that might have caused it; but stated that such a disturbance as that occurring when plaintiff was injured could not have happened if the voltage supplied by the electrical current had been normal in quantity and quality and the controller in perfect order in regard to contact, cleanliness, etc. He further stated that the makers of such machinery have been unable to make it absolutely perfect, and that accidents and derangements take place from time to time in spite of all they can do. Witness did not know the practice of the defendant with regard to the examination of these instruments on the cars that run on the line of street railway where plaintiff's employment took him at that time, as witness was then located at another place working for the defendant.

Plaintiff read in evidence the deposition of Owen Ford, which deposition had been taken for and on behalf of defendant. Mr. Ford first qualified to speak as an electrical expert. His testimony with respect to the electrical appliances in use on defendant's cars, the handling of electricity, and its use in the operation of cars, was practically the same as that of witness Pabish. He said that there was no way by which the motorman could control the amount of current that reaches the controller box, his control being limited to its application to the motive power of the car, and that explosions occur at infrequent intervals in spite of all and every precaution that might be taken to prevent them. Witness never knew of an explosion occurring in a motor box of sufficient force to break the metal of the box, or to injure the operator or motorman.

At the close of plaintiff's evidence defendant offered an instruction in the nature of a demurrer to the evidence, which the court refused to give to the jury, to which action of the court defendant duly excepted. The defendant offered no evidence, but stood on plaintiff's case.

At the instance of plaintiff, and over the objection and exception of defendant, the court instructed the jury as follows:

"(1) The court instructs the jury that if you believe from the evidence that on December 12, 1902, plaintiff was in the employ of defendant as a motorman on a car or the Bellefontaine line, and that while plaintiff was operating the machinery in his charge as motorman on the front platform of said car an explosion took place within the controller box on said platform, and that in consequence of said explosion plaintiff was thrown from said car and severely injured; and if you further believe from the evidence that the injuries which plaintiff received as aforesaid were directly

caused by negligence (that is to say, by want of ordinary care) on the part of defendant, in the particulars mentioned in the next two instructions of the court, and that plaintiff was using ordinary care for his own safety and in other particulars at and before the time of said explosion, then your verdict should be for the plaintiff.

"(2) The court instructs the jury that if you find from the evidence that an explosion took place as mentioned in the first instruction, and that it was directly caused by the failure of defendant to use reasonable care in procuring and using a reasonably safe controller, or that it was directly occasioned and caused by the failure of defendant to exercise ordinary care to inspect said controller, and to use reasonable care to discover its condition, and that defendant by the exercise of reasonable care in so inspecting said controller could have discovered its dangerous condition (if you find from the evidence it was in such condition) and averted the injury to plaintiff, and that defendant in failing to use reasonable or ordinary care as aforesaid was negligent and thereby failed to use reasonable care to furnish to plaintiff reasonably safe machinery for use by him as motorman on said car, then defendant was guilty of negligence within the meaning of the first instruction of the court.

"(3) The court instructs the jury that if you believe from the evidence that an explosion took place, as mentioned in the first instruction of the court, and that it was directly caused by the omission of defendant (by its agents and servants) to use reasonable and ordinary care to provide electrical machinery which should be reasonably safe for use by a motorman on duty on said car, and that said electrical machinery within said controller box was not within view of the plaintiff and that plaintiff could not, and did not, know its condition by the exercise of ordinary care on his part, and that plaintiff was not required by defendant to acquaint himself with the nature and operation of said machinery within said controller box, and that the explosion mentioned in the first instruction of the court (if you find it took place) occurred because of defendant's previous omission and failure to use reasonable care to have said electrical machinery inspected and maintained in a condition of reasonable safety for use by a motorman on duty on said car, in the situation and circumstances of plaintiff as shown by the evidence, then the defendant was guilty of negligence within the meaning of the first instruction of the court.

"(4) The court instructs the jury that by the terms 'ordinary care' and 'reasonable care' (as those terms appear in the instruction in this case) the court means that amount or degree of care which a person of ordinary prudence and caution (according to the usual and general experience of mankind) would exercise in the same situation and circumstances as those of the person or

persons mentioned in this case, who were required by law to exercise ordinary or reasonable care as stated in the instructions of the court; and the failure or omission of said person or persons to use such care as is above defined was negligence, in the sense in which that term is used in the instructions of the court. What constituted reasonable or ordinary care, as above described, is to be determined upon a full view and consideration by the jury of all facts and circumstances of each particular event or situation pointed out in instructions of the court in connection with the terms 'ordinary care' or 'reasonable care.'

"(5) The court instructs the jury that the question whether or not plaintiff was guilty of any negligence, in the circumstances shown by the evidence, is not an issue in this case.

"(6) The court instructs the jury that, if under the evidence and other instructions of the court you decide to find in favor of the plaintiff, you should assess his damages at such an amount as you believe from the evidence to be a reasonable compensation for any physical and mental pain and suffering which you believe from the evidence plaintiff endured as a direct result of said injury or injuries, as you find from the evidence plaintiff received by reason of said explosion, and for any expense paid by plaintiff on account of the reasonable value of such medical care and treatment, as you may believe from the evidence became necessary to plaintiff in consequence of said injury or injuries, as well as a reasonable compensation for the value of any loss of time or earnings which you may believe from the evidence plaintiff has suffered as a direct result of said injury, and also a reasonable compensation for any permanent injury (if any) which you may find from the evidence to have resulted to plaintiff as a direct consequence of the said injury or injuries to plaintiff, but the total amount of damages awarded to plaintiff in your verdict may not exceed the amount of $30,000, which is the sum claimed by plaintiff in his petition.

At the request of defendant, and over the objection and exception of plaintiff, the court gave the following instructions:

"(1) The court instructs the jury that defendant did not insure the safety of plaintiff, nor the safety of the controller in use on defendant's car. Defendant was only required to use reasonable care and foresight in procuring and using a reasonably safe controller.

"(2) The court instructs the jury that they cannot find for the plaintiff merely because they may find that there was an explosion in the controller box and that plaintiff was thereby thrown from the car and injured, nor can the jury guess at the cause of the explosion, or surmise that the defendant was negligent; but the law requires the plaintiff to prove to the reasonable satisfaction of the jury that the explosion in the controller box was due to some defective or unsafe condition of such controller, and that

the defendant by the exercise of reasonable care could have discovered such defect or unsafe condition and removed the same in time to have prevented the accident.

"(3) You are instructed as a matter of law that defendant was not required to furnish plaintiff with an absolutely safe controller, nor was defendant required to furnish the latest, most approved, or safest controller known or in use; but the law only required defendant to exercise ordinary care to furnish plaintiff a reasonably safe controller and to exercise ordinary care to keep the same in repair."

"(6) In accepting employment in the service of defendant for the performance of the work stated in his petition, plaintiff assumed all of the ordinary dangers and hazards pertaining to such work; and should the jury find from the evidence that the injury sustained by plaintiff was the result of an accident, and not the negligence of defendant as explained in other instructions, liable to occur in the performance of the work plaintiff was engaged in at the time of said accident, but was a risk incident thereto, then the plaintiff cannot recover, and the jury should find for the defendant.

"(7) The court instructs the jury that if they are unable to determine from the evidence whether or not the defendant, by the exercise of reasonable care, could have discovered any defects or unsafe condition in the controller box and its appliances, then they cannot find the defendant guilty of any negligence in respect to the condition of said controller box. The general rule of law is that the master must use ordinary and reasonable care to supply and maintain safe machinery, tools, and appliances with which to do the master's work; but the master is not required to furnish his servant machinery, tools, and appliances which are absolutely safe, nor can an employer be held guilty of negligence in the failure of the discharge of his duty towards his servant, where he furnishes machinery and appliances which are reasonably safe when used in the manner intended to be used, but which may become dangerous if used for a purpose for which they were not intended or adapted. Grattis *v.* K. C., P. & G. Railroad, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721."

The case was submitted to the jury upon the theory that a case of negligence was made out against the defendant if the jury should believe from the evidence that the defendant had failed to use reasonable care in procuring and using a reasonably safe controller, or that defendant failed to exercise ordinary care to inspect the controller which was in fact procured, when by the exercise of reasonable care in making inspections defendant might have discovered the dangerous condition of the controller, if it was dangerous. Defendant insists that in support of these issues there was no substantial evidence, or evidence sufficient to justify the submission

of the case to the jury. Upon the other hand, the plaintiff contends that the evidence that the controller "exploded" because it was not duly inspected, and that it was not in a reasonably safe condition, is direct and pointed, but that, even if the experts had not testified, the inference of negligence on the part of the defendant, under the circumstances, was cogent and persuasive.

The evidence showed that the controller boxes in use by defendant on its cars on the date when plaintiff was injured were what are known as the "General Electric" or "Westinghouse" controller boxes, and that they were at the time of the accident the best on the market. While there was evidence tending to show that any foreign substance in the controller, such as dirt, water, or grease, might produce arcking, that is, a slight flash or explosion, which might be prevented by inspection, there was no evidence of a failure by defendant to inspect the controllers in use as often as was seemingly necessary. So that it is not shown by the evidence that the defendant failed to use reasonable care in procuring for use on its cars a reasonably safe controller. Upon the contrary, the evidence shows that the controller which exploded and caused the injury was the "best on the market." The master is not required to furnish his servant absolutely safe appliances or machinery with which to work, but discharges the full measure of his duty towards his servant when he exercises ordinary and reasonable care to supply and maintain safe machinery, tools, and appliances with which to do the master's work. Minnier *v.* Sedalia, 167 Mo. 99, 66 S. W. 1072; Glasscock *v.* Swaferra Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364; Holmes *v.* Brandenbaugh, 172 Mo., loc. cit. 64, 72 S. W. 550; Tabler *v.* Railway Co., 93 Mo. 79, 5 S. W. 810; Grattis *v.* Railway Co., 153 Mo. 403, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721. This duty, however, does not make the master an insurer of the safety of the servant. Grattis *v.* Railway Co., *supra.*

It is asserted by plaintiff that "the expert proof affirmatively indicates the cause of the explosion to be the defective condition of the controller and want of necessary inspection to reveal and to correct that condition; that the duty resting on the master was not performed in this case, according to the positive evidence, even beyond the reasonable inferences to be drawn from the facts of the explosion and its deadly force; that circumstantial evidence of the cause of such an explosion or injury as here appears is sufficient, and it need not exclude every other possible hypothesis." We are unable to agree that the expert proof affirmatively indicates the cause of the explosion to be the defective condition of the controller, or the want of necessary inspection. These were facts which it devolved upon plaintiff to prove, or to prove a state of facts from which they might reasonably be inferred. Delahunt *v.* Tel. Co., 215 Pa. 241, 64 Atl. 515, is relied upon by plaintiff as sustaining his position; but in that case there was positive

evidence of defendant's negligence in permitting its wire, which was not properly insulated, to come in contact with the wires of another company, heavily charged with electricity, whereby the electric current was conveyed to the telephone of the deceased when he was making proper and lawful use thereof, and in consequence of the negligence of the defendant company deceased received a heavy shock of electricity and was killed. It is true that in Grimsley *v.* Hankins (D. C.) 46 Fed. 400, it is held that a steamboat boiler explosion, causing injuries, is *prima facie* evidence of negligence on the part of the owners and officers; but it is also held that this may be rebutted by evidence showing due diligence in supplying suitable machinery. From the evidence in the case at bar it is indisputable that the controller was of the best. In the case of Excelsior Electric Co. *v.* Sweet, 57 N. J. Law, 224, 30 Atl. 553, the general rule is held to be that the occurrence of the accident does not raise the presumption of negligence, but when the testimony which proves the occurrence by which a person is injured discloses circumstances from which the defendant's negligence is a reasonable inference a case is presented which calls for a defense. In our view, there were no circumstances disclosed by the evidence in this case from which negligence on the part of the defendant, either in the selection of the controller or the inspecting of it, can reasonably be inferred. Another case relied upon by plaintiff is Rose *v.* Stephens *et al.* (C. C.) 11 Fed. 438. That was a suit by a person who was injured by the explosion of a steam boiler used by the defendant to propel a vessel chartered by the defendant to be used for the transportation of passengers and freight. It was held, when an accident happens as by the bursting of a boiler, in the absence of explanatory circumstances negligence will be presumed, and the burden is cast upon the owner to disprove it. In discussing the same subject in the case of Transportation Company *v.* Downer, 78 U. S. 129, 20 L. Ed. 160, it is said: "There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

The rule announced in these cases only applies when the affair speaks for itself. "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred

contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer. The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault. In the words of Baron Channell, 'where it is shown that the accident is such that its real cause may be negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.'" Shearman & Redfield on Negligence (4th Ed.) § 59. In Tuttle *v.* C., R. I. & P. R. R. Co., 48 Iowa, 236, it is said: "It is true that, where a dangerous accident occurs which, under ordinary circumstances, would not have happened had the defendant and its employees exercised due care, prudence, and watchfulness, proof of such an accident, with its attendant circumstances, raises a presumption of negligence, and the burden of proof is then cast upon the defendant to rebut this presumption. To this end defendant must show that in the selection and operation of the machinery which caused, or contributed to, the accident it used due care, prudence, skill, and watchfulness. This is as far as, upon any well-recognized legal principle, the burden of proof can be cast upon the defendant, and is as far as any adjudication, to which we have been referred, has gone." This rule, however, has no application to the case at bar, for the reason that plaintiff alleges in his petition specific acts of negligence on the part of the defendant, in that negligence on the part of the defendant, in that "the dangerous and defective condition of said machinery which exploded could have been discovered by defendant by ordinary care in inspecting said controller prior to its explosion in ample time to have prevented said explosion." This question was submitted to the jury by plaintiff's instruction, and thus plaintiff assumed the burden of establishing the allegations by the petition. Dowell *v.* Guthrie, 116 Mo. 646, 22 S. W. 893; Yarnell *v.* Kansas City, Ft. Scott & M. Ry. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

The general rule is that the burden rests upon the plaintiff to prove the negligence of the defendant as alleged in the petition, and that such negligence was the proximate cause of the injury. "In other words, negligence is not presumed, but must be proved. The difficulty of proving the negligence charged does not affect the principle." 6 Thom. on Law of Neg. § 7695; Miller *v.*

Railway Co. 186 Pa. 190, 40 Atl. 413. We are firmly of the opinion that the doctrine of *"res ipsa loquitur"* is not applicable to the facts in this case. This, we think, is clearly demonstrated by the opinion of the St. Louis Court of Appeals in the case of Breen *v.* St. Louis Cooperage Co., 50 Mo. App. 202. Judge Rombauer, speaking for the court, said: "In Jones *v.* Yeager, 2 Dillon (U. S.) 68 (Fed. Cas. No. 7,510), the injury was the result of a boiler explosion. Judge Dillon, after briefly stating the well-known rules of law governing the master's liability in such cases, charged the jury as follows: 'In the application of these principles to the evidence, you will first inquire whether the boilers in this case were unsafe or unfit for use, and, if so, whether the defendant knew it, or as a reasonable man, having a due regard for the safety of his employees, ought to have known it, for, if he ought, his neglect in this respect would be equivalent, in imposing liability, to actual knowledge; and in the next place you must inquire, and, in order to hold the defendant liable, must find from the evidence, that this defect was the direct and immediate cause of the accident, without which it would not have happened, and, if you thus find, then the defendant would thus be liable.' That charge was given in a case where there was ample evidence tending to show that the boiler which burst was weak and worn, and expert evidence tending to show that it burst owing to such weakness. This clearly shows that the rule of *res ipsa loquitur* cannot be applied with any sense of reason to a case of complicated machinery, nor can the jury, from the mere fact that some defect exists in some part thereof, conjecture not only that such defect was the direct and immediate cause of the accident, but also that it was the duty of the defendant to foresee such conjectural result and guard against it. The employer fulfills his duty by guarding against the probable result of defects, even if such defects are shown. Holding him responsible for conjectural results shifts his liability from the ground of negligence to that of insurance.

"I have examined many cases on this subject, but find none sufficiently analogous in its facts to the present case to furnish a precedent of any value. Touching the law there is very little difficulty, but touching its application to the particular facts in this case the difficulty is great. That it is not for the defendant to account for the accident on a theory consistent with due care, but for the plaintiff to account for it on a theory inconsistent therewith, all the cases concede. That such theory must not rest upon bare conjecture, but must rest either upon direct proof, or upon proof of facts establishing a direct and immediate connection between the defects and accident complained of by logical inference, is equally conceded. The cases which probably come nearer in their facts to those of the present case are Searles *v.* Railroad, 101 N. Y. 661, 5 N. E. 66, and Dobbins *v.* Brown, 119

N. Y. 188, 23 N. E. 537, in both of which verdicts were set aside on appeal as resting not on legitimate inference, but on bare conjecture. In the first, the cause of the injury was a cinder which had lodged in the plaintiff's eye. Judge Earle, in delivering the opinion of the court, said: 'Where the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and he must fail also if it is just as probable that they were caused by one as by the other, as the plaintiff is bound to make out his case by a preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the damages were caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.' In the second case, the cause of the accident was the precipitation of the plaintiff's intestate from a bucket while descending a mine. The evidence showed that the cable attached to the bucket was broken after the accident, but there was no evidence how it came to be broken. Ruger, C. J., in delivering the opinion of the court, said: 'The trial court, in its charge to the jury, authorized them to infer that the accident might have happened from the accidental stoppage of the dummy yoke or follower at some point in the course of its descent, and its sudden fall thereafter, from a great distance, on the bucket. Any inference that the accident happened in the manner suggested would, it seems to us, have been substituting conjecture for proof, and violates the rule requiring proof always to be made the basis of recovery.' In Callahan *v.* Warne, 40 Mo. 136, Judge Holmes says: 'Negligence is something invisible, intangible, and, for the most part, incapable of direct proof, like sensible facts or physical events. It is, in general, a matter of inference from other facts and circumstances which admit of direct proof, and which may raise a presumption of the truth of the main fact to be proved. These facts and circumstances must be such as would warrant a jury in inferring from them the fact of negligence by reasoning in the ordinary way, according to the natural and proper relation of things and consistently with the common sense and experience of mankind.' In Smith *v.* Railroad, 37 Mo. 292, the same judge says: 'It is not enough that a part of the facts involved in the injury are made to appear. The whole issue must be proved, and the burden of proof is upon the plaintiff. If he failed to prove the whole issue, he comes short of making out a *prima facie* case, and the jury should be instructed to find a verdict for the defendant.'"

That the controller in question was a very complicated piece of machinery is clearly shown by the evidence, and brings the case squarely within the principles announced in the next preceding case. The evidence shows that any one of numerous causes

might have brought about the explosion, among which causes was the accumulation of dirt in the controller. Such dirt might have gotten into the controller at any time while the latter was in charge of the plaintiff while on the track without any fault or negligence on the part of defendant, and the explosion have occurred before defendant had any opportunity to inspect the controller, so that the cause of the explosion was purely theoretical and conjectural, and no judgment should be permitted to stand with no foundation whatever for its support.

Other points are insisted upon by appellant for reversal, but as the conclusion reached disposes of the case, we deem it unnecessary to pass upon them.

The judgment is reversed. All concur.

HORTON v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Oct. 10, 1907.)

[58 S. E. Rep. 993.]

Master and Servant—Injuries to Servant—Negligence—Question for Jury.—Where plaintiff was injured by the alleged negligence of his fellow servant, for which defendant was responsible as provided by Revisal 1905, § 2646, in dropping the end of the main rod of an engine while plaintiff was endeavoring to adjust it, and plaintiff testified, without contradiction, both that his fellow servant "dropped his end of the rod" and "that the rod slipped from his hand," whether the servant was negligent was for the jury.

Same—Presumption of Negligence.*—The dropping of the rod was not in itself conclusive of negligence on the part of such fellow servant, nor did it raise a presumption of negligence, though it was some evidence thereof.

Same—Duty to Furnish Competent Assistants.—Where defendant ordered plaintiff to repair an engine, it was defendant's duty to furnish plaintiff competent assistants, who would exercise ordinary care in performing the work.

Trial—Request to Charge.—Where the court charged that the fact that plaintiff was injured while in defendant's employ was "no evidence of negligence," and that the fact that plaintiff's fellow servant dropped the engine rod by which plaintiff was injured raised no presumption of negligence, and, if unsupported by other evidence from which the jury could reasonably infer negligence, was not proof of negligence, the court did not err in refusing to charge that, if the jury found from the facts that there were no attending circum-

*See preceding case, and foot-note.

stances from which they could reasonably infer negligence, other than the unexpected falling of the rod on plaintiff's arm, they should find that the defendant was not negligent.

Same—Assumed Facts—Applicability to Evidence.—Where plaintiff was injured by his fellow servant dropping his end of an engine rod while plaintiff was endeavoring to adjust it, and there was no evidence as to why he dropped it, a request that, if "there were no attending circumstances" from which the jury could reasonably infer negligence other than the fact of the unexplained falling of the rod, etc., was properly refused as assuming the evidence showed an "unexplained falling of the rod."

Appeal from Superior Court, Vance County; Biggs, Judge.

Action by W. R. Horton against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for personal injury sustained by plaintiff while in employment of defendant. Plaintiff testified that he was at the time of, and had been for many years before, the injury complained of, in the employment of defendant as yard locomotive engineer at Henderson N. C.; that on December 10, 1903, Mr. Clark, the traveling engineer of defendant, who had charge of its engines and the duty of looking after them, came to Henderson and told him that the front end of the engine was in bad condition and must be fixed at once. Plaintiff told Clark that the brass was worn out and that he could not fix it. Clark said that it must be done; that plaintiff must fix it at once. Plaintiff told him that he would do the best he could with it; that he had no tools. He said that it must be done that night. It snowed, and the wind blew "as hard as you ever saw it." When plaintiff quit work, he backed down to a yard and bought some wood. Seagrave was fireman on engine. Plaintiff says: "We were working on the main rod. Seagrave had never seen a rod taken down before and didn't look like he knew anything about it. I was trying to enter the rod into the back end of the strap, when his end slipped out of his hand and jerked my hand down on the rod. He dropped his end of the rod. I had hold of the other end of the rod. It mashed my arm. It was eight or ten feet long. It was about half-past 10 or 11 o'clock at night when I got through fixing the engine." He testified that certain tools were necessary to do the work, that he purchased a file himself, and that it was necessary to have one man to help him. The foregoing is all of the evidence in regard to the time, place, manner, etc., of the injury. There was evidence in regard to the condition of the engine and of the work to be done on it, and of the character and extent of the injury, none of which is necessary to set out in detail for the purpose of passing upon the exceptions referred to and relied upon in the defendant's brief. Defendant

moved for judgment of nonsuit. Motion denied. Defendant excepted.

The usual issues were submitted to the jury. His honor, after stating the contentions of the parties, among other instructions not excepted to, charged the jury: "As between master and servant, the mere fact of the servant being injured while in his employ is not *prima facie* evidence of negligence, and the burden is upon the servant to prove the injury was caused by the master, and he must show that the injury was the result of his negligence. It is not sufficient to show that he was injured. He must go further and show the cause of the injury, and that it was the result of negligence of some agent of the master, and that it was this negligence that was the proximate cause of the injury. So much for the questions of law which I shall give you to guide you and control your actions in determining the first issue. Now, applying these rules to the facts in the case, you must determine whether Mr. Horton was injured by the negligence of the defendant's fireman, Mr. Seagrave, and whether that negligence was the cause of the injury, if you find that Mr. Horton sustained an injury. Did the defendant railroad, through its agent, fail to exercise proper care, as I have explained to you, in handling this rod? And was such negligence the proximate cause of the plaintiff's injury, if you find he was injured, as claimed by him on or about December 10, 1903? That is the question which you must determine with reference to the first issue." His honor explained the evidence and directed the attention of the jury to the several issues and phases of the case. To this there is no exception.

Defendant requested his honor to give the following special instructions:

"As between master and servant, the mere fact that the servant is injured while in his employ is not prima facie negligence, and is no evidence of negligence." This prayer was given; the court adding: "But the burden of proof is upon the servant to prove that his injury is caused by the negligence of the master."

"Upon the whole evidence, if the jury believe it, they will answer the first issue 'No.' Refused, and the defendant excepts.

"The mere fact that plaintiff's arm was injured while in the employment of the defendant is no presumption of negligence." The court gave this instruction.

"The mere fact that Joseph Seagrave dropped the rod is no presumption of negligence." The court gave this instruction.

"The general rule is that the mere fact and proof of injury, unsupported by other evidence of negligence, or any attending circumstances whereby the injury can reasonably infer negligence; is not a presumption of negligence; and if the jury should find from the facts in this case there are no attendtending circumstances from which they can reasonably in-

fer negligence, other than the bare fact of the unexplained falling of the rod upon the plaintiff's arm, they will answer the first issue 'No.'" His honor gave the first part of the instruction, but omitted to give the latter part, to wit: "And if the jury should find from the facts in this case that there are no attending circumstances from which they can reasonably infer negligence, other than the bare fact of the unexplained falling of the rod upon the plaintiff's arm, they will answer the first issue 'No.'" Defendant excepted.

There was judgment upon the verdict. Defendant appealed.

Day, Bell & Allen, for appellants.
T. M. Pittman and *J. C. Kittrell*, for appellee.

CONNOR, J. (after stating the facts as above). Defendant, in the well-prepared brief and the oral argument of counsel, alleges as the first ground for a reversal of the judgment the refusal of his honor to direct judgment of nonsuit. This contention involves the proposition that there was no evidence of negligence fit for the consideration of the jury. It is conceded that plaintiff was in the line of his duty, acting by direction of an employee of the company having the power to give the order, and that Seagrave, whose alleged negligence was in dropping the rod from his hand, was a fellow servant for whose negligence defendant is liable under the fellow servant law. Revisal 1905, § 2646. Is there any evidence that Seagrave "dropped his end of the rod?" The plaintiff swears to it, and he is not contradicted. Seagrave is not introduced by either party. It is true that plainiff also used the expression, "The rod slipped from his hand." It was for the jury to say which was the correct statement. If he dropped the end of the rod while plaintiff's arm was in a position to be injured thereby, it certainly constituted some evidence from which the jury may have inferred negligence. It was his duty to hold the rod—to use such physical power as was at his command to prevent it from dropping. The dropping of the rod was not conclusive, nor, as his honor charged the jury, did it raise a presumption of negligence; but it was certainly some evidence thereof. In this connection his honor said to the jury: "In determining the question as to whether the agent of the defendant was or was not negligent in dropping or letting the rod slip, if you find he dropped or let it slip, the question of whether he acted as a reasonably prudent man would have acted under similar circumstance must be considered; the burden being upon the plaintiff to satisfy you by greater weight of evidence that the agent did not exercise proper care. If you are satisfied by the greater weight of evidence that the agent did not exercise proper care, that he was negligent, and that this negligence was the proximate cause of the plaintiff's injury, then, as I have explained, it is your duty to answer the first issue 'Yes.' If you are not satisfied by

the greater weight of evidence that he was negligent, or that it was the proximate cause of plaintiff's injuries, you will answer that issue 'No.'" His honor carefully explained to the jury that the burden of proof was upon the plaintiff, not only to show that Seagrave let—that is, permitted—the rod slip or drop from his hand, but that he failed to exercise the care of a prudent man to prevent its doing so. There is no suggestion that the rod slipped or dropped because of its weight, or that Seagrave did not have physical strength sufficient to hold it; that it was too heavy for one man to hold. It is true that plaintiff says: "I should say that it weighed 400 or 500 pounds. I never weighed one." Defendant's witnesses say that it did not weight to exceed 75 pounds. It was the duty of defendant, when, by its agent, it ordered plaintiff to fix the engine, to furnish a competent man to assist him, who would exercise reasonable—that is, ordinary—care in holding the rod. If it failed to do so, there was negligence; and, if such negligence was the proximate cause of the injury, it was actionable.

We have examined the cases relied upon by defendant. Bryan's Case, 128 N. C. 387, 38 S. E. 914; Alexander's Case, 132 N. C. 428, 43 S. E. 1003. We do not think them conclusive of the question presented by this record. Certainly, if it is the duty of one to hold up an iron rod while another person is in a position with reference to it that dropping it will injure him, the duty is imposed upon the person so holding to use ordinary care to prevent it from dropping. In the absence of any explanation why he "dropped" it, is it not a reasonable inference that he failed to exercise ordinary care? The principle governing cases of this kind has been so fully and so recently discussed by us that we deem it only necessary to cite the last one, in which Mr. Justice Hoke reviews all of them. Fitzgerald *v.* Railroad, 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N. S.) 337. We are all of the opinion that his honor correctly denied the motion for judgment of nonsuit, or to direct a verdict upon the first issue.

There is no exception to the charge as given argued in the brief, and we find no error therein. Defendant, however, earnestly contends that his honor committed prejudicial error in refusing to give the last part of the instruction asked. While it is settled by a number of cases decided by this court that a party is entitled to formulate a correct proposition of law applicable to phases of the testimony and have it submitted to the jury, it is equally well settled that if the court, either in its general instruction or in response to special prayers, has stated the same proposition in a form equally favorable to the contention of appellant, the failure to give such prayer is not reversible error. His honor had clearly instructed the jury in respect to the law applicable to the testimony. He had also, in response to defendant's prayer for special instruction, told the jury that the mere fact

that plaintiff was injured while in the employment of defendant was "no evidence of negligence"; that the "mere fact that Joseph Seagrave dropped the rod is no presumption of negligence"; and, again, that "the mere fact and proof of injury, unsupported by other evidence of negligence or any attending circumstances whereby the jury can reasonably infer negligence, is not a presumption of negligence." We are unable to see how much more strongly his honor could have put defendant's contention, unless he had instructed them that there was no evidence of negligence. Having submitted the question of negligence to the jury upon the theory that if they found that Seagrave dropped the rod, etc., we do not perceive how he could have said to them that, if they found no attending circumstances, they must find that there was no negligence. Plaintiff's contention was that, in the absence of "attending circumstances" explaining why he dropped the rod, the jury should infer that he did so negligently; that he was not exercising due care. To have given the instruction asked would have been to reason in a circle, and withdraw from the jury indirectly the very question which he had submitted to them. It was the unexplained dropping of the rod which plaintiff relied upon to maintain his contention.

It will be further noted that the instruction assumes that the evidence showed an "unexplained falling of the rod." This assumption has no support. All of the evidence is that Seagrave "dropped the rod," or that it "slipped" from his hand. It has been frequently held that, where the duty is imposed of securely fastening an object the falling of which endangers life or limb of one to whom the person owes the duty of fastening the object, the falling of it unexplained justifies the inference that it was not securely fastened. Winpelmann *v.* Calloday, 88 Md. 92, 40 Atl. 1078; Gerlach *v.* Edelmeyer, 88 N. Y. 645; Kearney *v.* Railroad, L. R. 5 Q. B. 411; and other cases cited in Womble *v.* Grocery Co., 135 N. C. 474, 47 S. E. 493. Here Seagrave was an intelligent human being, knew the conditions and the duty which he owed plaintiff, and almost certain injury to him if he dropped the rod. If there were "attending circumstances" explaining why he did so, as if his hands were benumbed by cold, or he was taken suddenly sick, or for any reason he was suddenly disabled, it was open to defendant to show such conditions. The instruction asked is not perfectly clear; but, as we interpret the language, his honor correctly declined to give it. The case has been, so far as an examination of the record discloses, fairly tried, and every phrase of the testimony submitted to the jury with correct instructions in respect to the law.

The judgment must be affirmed.

CHICAGO & E. R. CO. *v.* LAWRENCE.

(Supreme Court of Indiana, Nov. 27, 1906.)

[79 N. E. Rep. 363.]

Pleading—Complaint—Demurrer.—A complainant so uncertain as not to state intelligibly a substantially good cause of action is demurrable for not stating a cause of action.

Same—Grounds of Demurrer.—A complaint stating a good cause of action is not demurrable because of uncertainty, inconsistency, repugnancy, or duplicity.

Master and Servant—Injury to Servant—Action—Complaint—Sufficiency.—A complaint in an action against a railway company for the death of a switchman indicated that plaintiff chiefly relied for a recovery on a violation by the company of a municipal ordinance forbidding the running of locomotives backward in the nighttime without a light on the rear end, and set forth a copy of the ordinance. It also alleged the failure of the company to furnish the switch crew with a proper engine, and to maintain clearance posts at the place of injury, etc. The evidence indicated that the case was tried on the theory that the company was liable for noncompliance with the ordinance. The court in its instructions limited a recovery to that ground. Held, that the complaint was sufficient as setting forth a cause of action based on the violation of the ordinance.

Same—Contributory Negligence.—A complaint in an action against a railway company for the death of a switchman caught between the engine and a car which had been kicked onto a spur, which alleged that decedent did not know of the near approach of the engine to the car, sufficiently alleged decedent's freedom from contributory negligence, as against the objection that the complaint failed to charge that decedent was ignorant of the location of the car on the spur.

Same—Assumption of Risk.*—Burns' Ann. St. 1901, § 3541, cl. 42, authorizes cities to provide by ordinance for the security of citizens from the running of trains. A city adopted an ordinance requiring

*For the authorities in this series on the question whether a railroad employee assumes the risks arising from the violation of an ordinance or statute prescribing precautions to be observed by his company, see foot-notes appended to Norfolk & W. Ry. Co. *v.* Gesswine (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553; Ives *v.* Wisconsin Cent. Ry. Co. (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393 (speed in violation of statutes or ordinances); foot-notes appended to Atlantic Coast Line R. Co. *v.* Ryland (Fla.), 18 R. R. R. 834, 41 Am. & Eng. R. Cas., N. S., 834; foot-notes appended to Pittsburg, etc., Ry. Co. *v.* Ross (Ind.), 23 R. R. R. 160, 46 Am. & Eng. R. Cas., N. S., 160; Indianapolis St. Ry. Co. *v.* Kane (Ind.), 23 R. R. R. 151, 46 Am. & Eng. R. Cas., N. S., 151 (violation of employers' liability acts).

every locomotive running backward in the nighttime to keep a conspicuous light at its rear. A switchman continued work with an engine running backward in the nighttime without a light at its rear. Held, that the switchman did not assume the risk of injuries that might reasonably be expected from the failure to comply with the ordinance.

Trial—Special Verdict—Inconsistency with General Verdict.—In an action against a railway company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, the jury found that it was the duty of the switchman to see that the car was located on the spur at a safe distance from the track on which the engine was running; that there was nothing to prevent him from seeing where it was placed; that he announced to a fellow workman that it was placed so that it would clear; that, when alighting from the engine while passing the spur, he swung out of the cab down to the step with his back to the car, without using his lantern to ascertain the proximity of the car. The jury found a general verdict for plaintiff. There were facts proved supporting the general verdict. Held, that the general verdict must prevail.

Master and Servant—Injury to Servant—Contributory Negligence—Burden of Proof.—A master sued for the negligent death of an employee has the burden of proving, by a preponderance of the evidence, the contributory negligence of the employee.

Trial—Verdict—Special Verdict—Inconsistency With General Verdict.—In an action against a railway company for the death of a switchman caught between an engine and a car which had been kicked onto a spur track a short time before, the jury found that there was no evidence that the car was standing where it was when decedent had said it would clear, and that, if decedent had used his lantern when he went to leave the engine, he could not have seen the car on the spur. There was room for the car to stand clear, and when it was kicked onto the spur it ran until it struck other cars standing thereon. Held, that the general verdict did not show contributory negligence so as to render the same inconsistent with a general verdict in favor of plaintiff.

Appeal—Briefs—Rules of Court—Compliance.—Where the testimony involved in assignments of error relating to the admission and rejection of evidence covered more than 50 printed pages, and appellant failed in his brief to give the page and line of the record where the action of the court complained of might be found, as required by Supreme Court Rule 22, the court would not consider the objections.

Same—Verdict—Conclusiveness.—Special findings supported by some evidence will not be disturbed on appeal.

Appeal from Circuit Court, Porter County; W. C. McMahan, Judge.

Chicago & E. R. Co. *v.* Lawrence

Action by Mary L. Lawrence, administratrix of Lewis P. Lawrence, deceased, against the Chicago & Erie Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under section 1337u, Burns' Ann. St. 1901. Affirmed.

W. O. Johnson and *Jno. B. Peterson,* for appellant.
William J. Whinery and *Otto J. Bruce,* for appellee.

HADLEY, J. In its yards at Hammond appellant has a track, running north and south, known as "72." South of the middle there is a spur connected with 72 and running to the northwest. Appellee's decedent, Lewis P. Lawrence, was a switchman in the employ of appellant, and a member of a switching crew engaged in the Hammond yard. On February 8, 1904, at about 8:30 o'clock p. m., Lawrence and the crew to which he belonged took a train of cars south on track 72 beyond the spur intersection. The engine was backing, drawing the cars after it. The train having passed the spur, the direction was reversed, and going north a car of coal was kicked in on the spur. The train then proceeded north, the engine pushing the cars ahead of it, to a point 100 yards or more north of the spur intersection. Here the train was stopped, and to set an empty flat car also on the spur the engine returned south, drawing the flat after it at the rate of about five miles an hour. When the return south with the flat was started, Lawrence and the other switchman got into the engine cab. The night was cloudy and very dark. The engine, which was backing, had a headlight in front looking north, but no light on the rear of the tender looking south, except two "bull's eye" lights, in size and brilliancy about the same as signal lanterns. As the engine approached some where near the spur intersection, Lawrence, standing on west side of the cab, with signal lantern in hand, proceeding, in the proper discharge of his duty in switching the flat car, seized the handiron of the cab, and let himself down to the step leading to the ground. The coal car that had been previously kicked onto the spur, at the moment Lawrence was alighting from the cab, was standing on the spur, a short distance north of the spur frog, and about 6½ inches west of the line described by the passing engine cab, and when on the engine step Lawrence was caught and rolled between the coal car and engine cab and fatally injured. Appellee, as administratrix, brought this action to recover for the benefit of herself as widow, and their minor children, on the ground that the death of her husband was caused by the negligence of the appellant. The complaint is in one paragraph, to which a demurrer for insufficiency of facts was overruled. On an answer of general denial the case was submitted to a jury, which returned a verdict for appellee, and answers to a large number of interrogatories. Error is assigned on the overruling of the demurrer to the com-

plaint, the overruling of a motion for judgment on the answers to interrogatories, and for a new trial.

The sufficiency of the complaint is questioned on the grounds of uncertainty, inconsistency, and repugnancy. There is no ground for controversy with appellant that, if a pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense, it will be subject to demurrer for not stating a cause of action or defense, as ruled in Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370, and many other cases. This complaint, however, cannot be justly said to come within the rule. It does contain much unnecessary matter, and gives evidence that the pleader was not clear on what class of facts he should rest his case. The averments concerning the failure of the defendant to furnish the decedent's crew with such a switch engine as was in common use in switch yards, and the failure of the defendant to have and maintain clearance posts at the place of injury, and its failure to have and maintain lights at that place, and the failure of the engineer in charge of the locomotive to warn the decedent of the dangerous proximity of the coal car on the spur, and the violation of the appellant's rules in requiring the decedent to work overtime, are all matters that incumber and cloud the complaint, and the pleading would have been much strengthened as a model if they had been omitted. But, if a good cause of action is in fact stated, the complaint will not fall before a demurrer because of uncertainty, inconsistency, or repugnancy. Coddington *v.* Cannady, 157 Ind. 243, 61 N. E. 567; Tipton Light Co. *v.* Newcomer, 156 Ind. 348, 58 N. E. 842; Sheeks *v.* State, 156 Ind. 508, 60 N. E. 142; Frain *v.* Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395. Neither will a demurrer reach duplicity in a pleading. Rielay *v.* Witcher, 18 Ind. 458; Denman *v.* McMahin, 37 Ind. 241; Jones *v.* Hathaway, 77 Ind. 14, 19. The complaint is no worse than it was before answer, and if more than one cause of action is stated, or it is so inconsistent, uncertain, or repugnant as to mislead the defendant in the preparation of its defense, it should have made available its complete remedy by a motion to separate or to make more certain and definite. There is, however, running through the complaint a chain of averments that indicate, with reasonable clearness, that the pleader chiefly counted upon the violation of an ordinance of the city of Hammond against running locomotives backward in the nighttime without a brilliant and conspicuous light at the rear end thereof. A copy of the ordinance is set forth in the complaint, and the trend of the evidence indicates that this was the theory upon which the case was tried. Besides, this theory is made clear by the court in his charge to the jury. After calling their attention to certain averments in the complaint relating to other alleged delinquencies of the defendant, the charge proceeds: "But the court instructs you, as a matter of law, that under the issues and evidence in this

case there can be no recovery on account of * * *. This will leave for your consideration the questions relating to the alleged violation of the alleged ordinance." The rule is that, where the predominating theory of a complaint is doubtful or uncertain, the theory adopted by the parties and the trial court will be adhered to on appeal. Reeves *v.* Grottendick, 131 Ind. 107, 30 N. E. 889; Machine Works *v.* Myers, 15 Ind. App. 385, 44 N. E. 193.

The only specific objection to the complaint upon this theory is that there is no charge in the complaint that appellee's decedent was ignorant of the location of the coal car standing on the spur track, and its dangerous proximity to the main track over which the engine was passing, at the time of the injury, and that we must presume that he did not know of its position, and, having exposed himself as the engine passed, he was guilty of contributory negligence. With respect to this point the complaint is as follows: "Said decedent did not know of, had no means of knowing, and could not see by reason of the darkness and the defendant's failure to provide proper headlights and equipment of said engine, the near approach of said engine to said coal car, and the danger to which he was thereby exposed." Omitting the qualifying sentences, the averment is that the decedent did not know of the near approach of the said engine to said coal car. This is equivalent to alleging that he did not know where the coal car was, and is sufficient.

A general objection is made to the refusal of the court to give certain instructions requested by appellant. Excepting the eleventh and twelfth, every point stated in the others was fully covered by those given by the court and quite as favorable to the defendant as it had the right to ask, including No. 10. The eleventh and twelfth were refused, and rightly so, because they contained a misstatement of the law. Both requests were to the effect that if the decedent knew, or by the exercise of reasonable diligence might have known, at the time of his injury that the locomotive being used was not equipped with a headlight on the rear end thereof, and had a high, square tank, and the injury resulted from the absence of such light on the rear end thereof, if it was found that the decedent continued in the employ of the defendant and to work on and about such engine after knowing of the dangers attendant upon the use of an engine so equipped as a switch engine, then the jury was instructed as a matter of the law that the dedecent assumed the risk of all injuries that might reasonably be expected to flow from the use of such engine in such business. It will be borne in mind that the negligence charged in the complaint, and relied on, is the violation of an ordinance of the city of Hammond in these words: "Sec. 3. Every locomotive engine, railroad car, or train of cars, running in the nighttime on any railroad track, in said city, shall have and keep while so running a brilliant and conspicuous light on the forward end of

such locomotive engine, or train of cars, and in such case any such engine, car or train, shall be run backward at such time, such lights should be kept at the rear end thereof." This ordinance imposed on the defendant a fixed and positive duty to keep a brilliant and conspicuous light on the rear end of its locomotives when running backward in the nighttime within the city. Section 3541, Burns' Ann. St. 1901, cl. 42. The doctrine of assumed risk does not apply to relieve a person from the consequence of a breach of specific statutory or municipal duty. Railroad Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; Island Coal Co. *v.* Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; Car Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828.

Appellant's counsel earnestly insist that the answers to interrogatories in effect show that the decedent was guilty of negligence that contributed to his injury, and that its motion for judgment thereon ought to have been sustained. The answers disclose that Lawrence was a man of 34 years, 5 feet 4 inches tall, an experienced switchman, of ordinary intelligence, and possessed of all his faculties. He had been employed by appellant as a switchman in the Hammond yard for 10 months before the injury, and had been working with and about the particular engine from which he was alighting when hurt 3 days. He commenced working with said engine at 8 o'clock a. m. and continued until he was hurt, about 8:30 p. m. The engine had an ordinary headlight in front, lighted and in good repair. When injured, the engine was running backward at the rate of five miles an hour, drawing one flat car after it. The spur track was on a common level with track 72. The coal car standing on the spur was 9 feet and 8 inches wide, painted a dark red, and was standing in such proximity to track 72 that, as the engine backed past on 72, there was but 6½ inches between the sides of the car and the tender of the engine. Lawrence was riding on the deck of the engine, and as it was approaching the spur connection, and as it was about to pass the coal car standing on the spur, with a lighted lantern swung out of the cab to the step leading down to the ground to be ready to couple the flat to the coal car when the former came in on the spur, with his back toward the coal car, and his body came in contact with the car and was carried and rolled between the car and the cab of the engine. It was the duty of Lawrence, as a member of the switching crew, at the time the coal car was thrown on the spur, to see that the car, when it was placed on the spur, was placed a sufficient distance from the frog and track 72, so that engines passing over 72 could pass and repass said car with their switching crews riding or working about their engines with safety to the crews. When the coal car was thrown on to the spur, Lawrence, in answer to an inquiry of another member of the crew, said, "She will clear."

The coal car was placed on the spur about five minutes before Lawrence's death. There was no evidence that the coal car was left by the switching crew on the spur at the same place it was found standing at the time of the accident. There was room enough on the spur to have enabled the crew to have set the coal car far enough in to have made it safe for crews engaged on and with passing engines. Others of the crew had the same opportunity to know that the coal car was standing too close to track 72. There was nothing to prevent Lawrence from seeing where the coal car stood at the time it was left. If Lawrence had used the lantern he had in his hand as he atempted to alight from the engine, backing to the south, he could have seen the coal car.

Appellant calles attention to the findings that it was the duty of the deceased, as switchman, to see that the coal car was located on the spur at a safe distance from track 72; that there was nothing to prevent him from seeing where it was placed; that he announced to a fellow workman that it was placed so that it "would clear," and when in the act of alighting from the cab of the engine, while it was backing south passed the coal car standing on the spur, he swung out of the cab down to the step, with his back to the coal car without using his lantern to ascertain the proximity of the coal car. These facts are, however, but a part extracted from the body of facts proved in the trial, and upon which the jury determined the general verdict. We have no means of ascertaining what other facts may have been proved to explain or modify the special findings and become controlling in reaching the verdict. Hence the general rule that this court on considering answers to interrogatories will indulge all reasonable presumption against the special findings, and in favor of the general verdict; and, if the general verdict thus aided is not wholly inconsistent with the special answers upon any rational hypothesis, it must prevail. City of South Bend *v.* Turner, 156 Ind. 418, 423, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; Wright *v.* Railway Co., 160 Ind. 583, 589, 66 N. E. 454; Railway Co. *v.* Rowan, 104 Ind. 88, 96, 3 N. E. 627.

Contributory negligence was provable like any other facts within the issues, by a preponderance of the evidence; and the burden was upon the defendant. There is evidence in the record that there was plenty of room on the spur for the coal car to stand clear of track 72, and that, when the coal car was kicked in onto the spur, it ran in till it struck other cars standing thereon. There is a special finding that there was no evidence that the coal car, when it caused the decedent's injury, was standing where it was when the decedent said it would "clear." There is also a finding that, if the decedent had used his lantern when he went to leave the cab, he could not have seen the coal car standing on the spur. If the car was moved from a place of safety to a place of danger, as we must here presume that it was after Lawrence left it,

and without his knowledge, and if the night was so dark and heavy that he could not have seen the car as he left the cab, if he had used his lantern, as the jury found the fact to be, then the jury was justified in acquitting him of negligence in these respects. So under these facts, the evidence, and rules of construction, we cannot sustain appellant in its contention that the general verdict which in effect finds that the decedent was not guilty of contributory negligence, cannot be reconciled with the special findings. Therefore the motion for judgment on the answers to interrogatories was properly overruled.

In its motion for a new trial, also in the statement of errors relied on, appellant sets forth divers objections to the admission and exclusion of certain evidence. But the bill of exceptions is voluminous, the testimony of the witness chiefly involved covering more than 50 printed pages, and appellant has wholly failed, in his brief, to give the page and the line of the record where the action of the court complained of may be found, as required by rule 22 (55 N. E. v). We have, therefore, omitted consideration of such objections.

It is also claimed that the evidence did not sustain the special findings relating to the decedent's contributory negligence. But there is some evidence in support of each of them, and it was for the jury, not us, to say whether it amounted to satisfactory proof.

We find no error in the record. Judgment affirmed.

GILLETT, J., did not participate.

PUGMIRE *v.* OREGON SHORT LINE R. CO.

(Supreme Court of Utah, Dec. 11, 1907.)

[92 Pac. Rep. 762.]

Master and Servant—Relationship—How Constituted—Duty of Master to Care for Safety of Servant.—Where defendant railroad employed plaintiff's husband as manager for its outfit cars, requiring him to cook or else furnish a cook, and permitted plaintiff to accompany him and cook for the outfit employees, the relation of master and servant existed between plaintiff and defendant within the meaning of the rule requiring a master to exercise ordinary care to prevent injury to his employees, though plaintiff was not entitled to pay for her services.

Same—Negligence—Injuries to Servant.†—Where a railroad's outfit cars were fitted up and stationed on one of its side tracks for the use and occupation of its employees, the employees had the right to assume that the railroad would exercise ordinary care to prevent the cars from being run into by its switch engines and passing trains.

Same—Contributory Negligence—Questions for Jury.—In an action against a railroad for injuries to plaintiff received in a collision between the car in which she was working and one of defendant's engines, the questions of defendant's negligence and plaintiff's contributory negligence held for the jury.

Appeal—Questions for Review—Findings of Jury.—Findings of the jury under proper instructions on questions of fact are final and cannot be disturbed by the Supreme Court.

Master and Servant—Injuries to Servant—Contracts Releasing Liability—Validity.‡—A master cannot by contract in advance absolve

*For the authorities in the series on the question who are, and are not, the employees of a railroad company, see foot-notes appended to Arkadelphia Lumber Co. *v.* Smith (Ark.), 24 R. R. R. 514, 47 Am. & Eng. R. Cas., N. S., 514; Hayman *v.* Philadelphia, etc., R. Co. (Pa.), 24 R. R. R. 475, 47 Am. & Eng. R. Cas., N. S., 475; foot-notes appended to Louisville, etc., Ry. Co. *v.* Illinois Cent. R. Co. (Ky.), 22 R. R. R. 653, 45 Am. & Eng. R. Cas., N. S., 653; Atchison, etc., Ry. Co. *v.* Fronk (Kan.), 22 R. R. R. 95, 45 Am. & Eng. R. Cas., N. S., 95; Shannon *v.* Union R. Co. (R. I.), 22 R. R. R. 80, 45 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to Alabama G. S. R. Co. *v.* Burks (Ala.), 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562.

†For the authorities in this series on the subject of the right of a servant to assume that his master or his representative has performed or will perform his duties to the servant, see foot-notes appended to O'Brien *v.* St. Paul City Ry. Co. (Minn.), 23 R. R. R. 323, 46 Am. & Eng. R. Cas., N. S., 323; foot-notes appended to Indianapolis St. Ry. Co. *v.* Kane (Ind.), 23 R. R. R. 151, 46 Am. & Eng. R. Cas., N. S., 151; Floan *v.* Chicago, etc., Ry. Co. (Minn.), 23 R. R. R. 95, 46 Am. & Eng. R. Cas., N. S., 95.

‡See foot-notes appended to Pittsburgh, etc., Ry. Co. *v.* Ross (Ind.), 23 R. R. R. 160, 46 Am. & Eng. R. Cas., N. S., 160.

himself from liability for injuries to a servant caused by the master's negligence; such a contract being void as against public policy.

Same—Evidence.—In an action by a female employee against a railroad for injuries through negligence, evidence as to whether plaintiff was married or not was immaterial.

Damages—Pleading—Issues, Proof, and Variance.—Where, in an action for injuries through negligence, plaintiff specifically alleged certain injuries to her head, back, arms, etc., and that she was thereby permanently incapacitated from performing her daily work as a cook and housewife, no mention being made of any injury to her eyes, evidence as to the diseased condition of her eyes since the accident was inadmissible, since, having limited her allegations of injury to specific matters, she was confined in her proof to them and to consequences which could be reasonably inferred as flowing therefrom.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by Christine Pugmire against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

P. L. Williams, Geo. H. Smith, and *Jno. G. Willis,* for appellant.

Kinney & Wilson, for respondent.

MCCARTY, C. J. A rehearing was granted in this case, and we have again given the questions involved careful consideration. While we are still of the opinion that the result announced in the decision heretofore filed is correct, and that the judgment must be reversed, we are convinced that the opinion, in some particulars, ought to be modified. In view of such fact, the case is decided, ruled, and controlled by this opinion only.

The action in question was brought to recover for personal injuries alleged to have been sustained by plaintiff at Williams, in the state of Montana, where she was at work for defendant as cook in one of its outfit, or hotel, cars. The complaint alleges that plaintiff was the servant of defendant, and, as such, was required to work and remain in its car as the same was situated on a side track; that while working and remaining therein, the defendant, without notice or warning to plaintiff, negligently and suddenly ran one of its engines into said car, whereby plaintiff "suffered a violent blow upon the head cutting the scalp in four places, necessitating the cutting of all the hair from her head, and rendering plaintiff unconscious for several hours, back sprained and wrenched, so that the same is still sore and lame, arms bruised and sprained, right limb injured and sprained, and internal injuries causing serious injuries to female organs; that by reason of said injuries the said plaintiff has suffered, and for

all time will continue to suffer, great bodily pain * * * and has been incapacitated, and for all time will be incapacitated, from performing her daily work as a cook and housewife, and has been, and for all time will be, permanently crippled and scarred." The answer denies the allegations of negligence in the complaint, and affirmatively alleges contributory negligence on the part of the plaintiff. The answer further alleges that plaintiff was not a servant of the defendant; that she was permitted to be upon the car in question solely because plaintiff and one William Liffon Pugmire represented themselves to be husband and wife, and defendant, having employed said William Liffon Pugmire as manager of certain outfit cars, permitted plaintiff to accompany said Pugmire and be upon the cars with him as his wife, upon the belief that she was his wife; that, in consideration of said permission, the plaintiff agreed to release defendant from all damages on account of any injury she might sustain during her residence on said cars.

It appears from the record that on July 19, 1905, at Pocatello, Idaho, the William Liffon Pugmire referred to in defendant's answer was employed by defendant company as manager of one of its outfit cars. At the time Mr. Pugmire was employed, he and plaintiff signed a release, of which the following is a copy: "Whereas, William Liffon Pugmire is employed by the Oregon Short Line Railroad Company as manager Outfit 76 on its outfit cars and lives on and about said cars, and has with him Christine Pugmire, his wife; and whereas, they agree to waive and release the said railroad company from any and all rights they might otherwise have to sue and recover for damages on account of any injury to the said William Pugmire and Christine Pugmire during the continuance of such employment and residence on said cars: Now, therefore, in consideration of the permission to said William Liffon Pugmire and Christine Pugmire to be upon said cars as aforesaid, we do hereby release and forever discharge the said railroad company and its successors from any and all claim and liability for damages resulting from injuries which may be received by the said William Liffon Pugmire and Christine Pugmire while in and about the cars, trains and railroad of said company, whether received through accident or carelessness on their own part, or on the part of any employee or person, or otherwise; this release being intended to embrace and include all claims for loss of service and for disability, pain or suffering resulting directly or indirectly from any kind of injury or death."

In the evening of the same day on which he was employed, Pugmire, accompanied by his wife, the plaintiff, went with the outfit cars mentioned to Williams, Mont., where the outfit cars were placed on a side track by defendant company. As stated by appellant in its brief: "There were several cars composing

the entire outfit, some being fitted up as sleeping cars for the workmen, and then there were three cars consisting of a dining car, a kitchen or commissary car, and a bedroom. The commissary and bedroom were one car partitioned off for this different use. Pugmire was manager of the outfit, so far as the cooking and feeding was concerned. Plaintiff did the cooking, and Pugmire waited on table, and they together occupied the bedroom arranged in the commissary car, as their sleeping quarters." Plaintiff did not receive any wages for her work from the defendant, nor did her name appear upon its pay roll. At the time of the accident, the outfit was located at Williams' Siding, Mont., with the bedroom on the south end of the outfit. This room had two windows in it, one on each side, and both open at the time in question. It was about 9 o'clock in the evening, and dark. Mr. Pugmire, plaintiff, and a timekeeper named Smuttger had, for some 15 minutes prior to the accident, been engaged in making some changes about the bed in the bedroom end of the car; and, just before the accident, the timekeeper had carried some part of the bedding or bunk out of the car. The plaintiff followed him to the west door of the commissary part of the car. There she left him and Mr. Pugmire outside of the car, and returned to the bedroom. As to what then transpired, plaintiff, whose testimony is not disputed, testified as follows: "Immediately after he (referring to Smuttger) got out of the car, I heard him say: 'My God! They are running into us. Jump!' And I, being near the window, looked out and saw the headlight of the engine and heard the engine coming. * * * It did not look to me to be more than 50 or 75 feet away at the time. It looked as if it was coming pretty fast. I started for the door, but before I got there I was knocked unconscious. I don't remember getting to the door at all. * * * I did not get out of the room. I heard no whistle or bell. I heard nothing sounded. I just heard the rustle of the train as it was coming. * * * I was in perfect health prior to this accident. When I came too in the baggage car, my head was bound up. I had severe pains in my back, limbs, and head, and was helpless. There were bruises on my body, and my clothes were torn, and my face and head was covered with blood. Prior to this accident, I could not see with my right eye distinctly, but my left eye was all right. Since the accident I cannot see to read or sew, and suffer pain in my eye. * * * It (referring to her eyesight) has been failing pretty fast since this accident." Dr. Henry La Motte, an oculist by profession, testified that some six months after plaintiff received the injuries complained of he made an examination of her eyes, and found them to be afflicted with a painful disease known as glaucoma; that in his opinion she would become totally blind in both eyes, unless a succcessful operation upon them were performed; that at the time he made the examination the left eye

appeared to have been affected for about five or six months. After describing various causes which produce glaucoma, the doctor testified: "The next most frequent cause is some form of nervous shock. This may be either mental or physical, but it has to be a pretty severe nervous shock. The next most frequent cause is an injury to the eye itself. Sometimes a slight injury is enough to cause an acute attack of glaucoma." In answer to the question, "Judging from her condition, what was the cause of that condition, to your best opinion?" the doctor answered: "That I couldn't say. Any one of those causes could have been." He further testified that the disease could have been produced by a blow on the head such as the evidence showed plaintiff received in the collision hereinbefore mentioned.

The case was tried to a jury, and a verdict of $3,500 returned in favor of plaintiff. To reverse the judgment entered on the verdict, the defendant has appealed to this court. After the plaintiff had introduced her evidence in chief and rested her case, the defendant moved the court for a judgment of nonsuit upon the following grounds: (1) That plaintiff had failed to show that the relationship of master and servant existed between her and defendant; and (2) that plaintiff was guilty of contributory negligence in not heeding the warning given her to get out of the car. This motion was overruled, and, at the close of the entire case, the defendant requested the court to direct a verdict for the defendant, which request was also refused. These rulings are now assigned as error.

The record shows that, when Pugmire applied to defendant company for employment, O. D. Gefeke, who was, at the time, inspector of outfit cars for defendant, and who also had charge of the employment of cooks and managers on such cars, inquired of Pugmire whether he had a wife, and if he wanted her to be on the cars with him. Pugmire answered that he had brought his wife (plaintiff herein) with him, and stated that he wanted her to accompany him, at the same time pointing her out to Gefeke. Gefeke then stated to Pugmire that if he wanted his wife to go along they would have to sign the release hereinbefore referred to. Gefeke was called as a witness by defendant, and testified, in part, as follows: "The duties of an outfit manager are: To cook, prepare meals, order supplies, etc. As a rule we inquired whether the particular individual happened to be a cook or not. If he could not cook, then he had to furnish the cook. Where his wife accompanied him, it was taken for granted that she could cook and would assist in the work; and that was why the wife was permitted to go. When a man had his wife with him, if he could not cook, and she did the cooking, it was all right with me, and with the Short Line Company. We would not have employed Pugmire if he had not provided the cooking in some way." Plaintiff testified that from the time

she arrived at Williams on the outfit cars in question (July 19, 1905) until July 22, the day of the accident, she "cooked the food for the men of the Oregon Short Line (defendant);" that those men took their meals at the car; and that she "did the cooking, dish washing, and straightening up around there in general;" that on two occasions the foreman of this crew of men gave her orders respecting the kind of food she was to cook and prepare for the men; and that she carried out the orders.

It thus clearly appears—in fact, there is no conflict in the evidence on this point—that plaintiff cooked for the employees of the defendant, washed the dishes, cleaned up, and took care of the commissary and dining car, and in so doing acted as a substitute for Pugmire, and that, too, with the knowledge and approval of the defendant, and that it received the benefit of her labor. The plaintiff was not a trespasser or mere licensee, but was rightfully in the car doing work for the defendant, and, as stated, with its knowledge and acquiescence. And, furthermore, the evidence introduced by defendant shows that one of the conditions upon which it employed Pugmire was that, "if he could not cook, then he had to furnish a cook." The representative of the company whose duty it was to employ managers for defendant's outfit cars, and who employed Pugmire, testified: "We would not have employed Pugmire if he had not provided the cooking in some way." In other words, under the terms of his employment, Pugmire was obliged to either do the cooking himself or get some one to do it for him. Whether the plaintiff was in the direct employment of defendant or indirectly as the assistant of Pugmire can have no bearing on the question, because, in either event, according to the great weight of authority, the relation of master and servant existed between plaintiff and defendant within the meaning of the rule requiring a master to exercise ordinary care to prevent injury to his employees. Therefore, under the facts and circumstances disclosed by the record in this case, defendant owed plaintiff the same duty for her safety that it owed to Pugmire and its other employees. And this, too, notwithstanding the fact that plaintiff was not entitled to pay from defendant for her services. Wilson *v.* Sioux Con. Min. Co., 16 Utah, 392, 52 Pac. 626; Ringue *v.* Oregon Coal Co., 44 Or. 407, 75 Pac. 703; Tennessee Coal Co. *v.* Hayes, 97 Ala. 201, 12 South. 98; Rummell Ar. *v.* Dilworth, 111 Pa. 343, 2 Atl. 355, 363; Haluptzok *v.* Railway Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; Aga *v.* Harback, 127 Iowa, 144, 102 N. W. 808, 69 L. R. A. 255, 109 Am. St. Rep. 366; 4 Am. & Eng. Annotated Cases, 441; Anderson *v.* Guineau, 9 Wash. 304, 27 Pac. 449; 1 Shear. & Redf. Neg. 182.

The contention that there was no evidence introduced to show that the accident in which plaintiff received the injuries complained of was due to the negligence of the defendant company

is not borne out by the record. The undisputed evidence shows that the outfit cars in which plaintiff was injured were fitted up and placed and stationed by defendant on one of its side tracks for the use and occupation of plaintiff and certain employees of the company. And plaintiff had a right to assume that defendant would exercise ordinary and reasonable care to prevent these cars from being run into by its switch engines and passing trains. The record, as it now stands, shows that an engine propelled on defendant's railroad tracks was, without warning or signal, run onto this side track and into the outfit cars. It also appears from the undisputed evidence that, when plaintiff discovered that the engine mentioned was about to collide with the outfit cars, she immediately endeavored to leave the car, but was unable to do so before the collision. Under these facts and circumstances, the question of negligence on the part of the defendant company and of contributory negligence on the part of the plaintiff were questions of fact for the jury to determine; and the jury having, under proper instructions by the court, found against defendant on these issues, the findings are final and cannot be disturbed by this court.

The defendant requested the court to instruct the jury that, in case they found that the release hereinbefore mentioned was "entered into without fraud or deceit on the part of the defendant, then the plaintiff would be bound by the terms of said release and would not be entitled to recover in this action," etc. The refusal of the court to so instruct the jury is now assigned as error. We think this assignment is without merit. The law is well settled that a master cannot, by contract in advance, absolve himself from liability (which would exist if no contract were made) for injuries to his servant caused by the master's own negligence. The ground upon which such contracts are held to be void is that they are against public policy. The reason for the rule is well stated in the case of Railway Co. *v.* Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833, wherein it is said: "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements." The same question was before this court in the case of Stone's Adm'r *v.* Union Pac. Rd. Co., 89 Pac. 715, and in an opinion written by Mr. Justice Straup it is said: "The decided weight of authority in this country sustaines the proposition that a contract whereby an employee agrees in advance to relieve his em-

ployer from liability for injuries resulting from the latter's negligence, or that of his employees, when he is, by the law of the jurisdiction, responsible for their negligence, is void as against public policy." Numerous authorities are cited in the opinion, which declare the same doctrine.

During the progress of the trial the plaintiff was asked, upon cross-examination, if she and Pugmire were married. Objection was made to this question and others of like character on the ground that they were immaterial and not cross-examination. The objections were sustained, and exceptions were noted by defendant. The rulings of the court in sustaining the objections are assigned as error. We think the court did right in sustaining the objections. The defendant's liability or nonliability in no way depended upon the marital relationship existing between plaintiff and Pugmire, but depended upon the question of defendant's negligence and upon the relationship existing between it and plaintiff at the time the accident occurred. If Pugmire were suing the company to recover damages for the loss of services of Mrs. Pugmire as his wife, the relationship existing between them might be material; otherwise not.

The next error assigned relates to the admission of evidence, over defendant's objection, of the diseased condition of plaintiff's eyes since the collision. It is contended that since plaintiff enumerated in her complaint the injuries for which she claimed damages, and made no averment of any injury to her eyes, it was error for the court to admit evidence of their diseased condition. The injuries alleged in the complaint are: (1) A violent blow upon the head cutting the scalp in four places; (2) back sprained and wrenched, so that the same is still sore and lame; (3) arms bruised and sprained; (4) right limb injured and sprained; and (5) internal injuries causing serious injury to the female organs. And the result or consequences of these injuries, as alleged in the complaint, are: (1) That the plaintiff has suffered, and for all time will suffer, great bodily and mental pain and anguish; (2) that she has been, and for all times will be, incapacitated from performing her daily work as a cook and housewife; and (3) plaintiff has been, and for all time will be, permanently crippled and scarred. Here we have each specific injury, as well as the consequences flowing therefrom, upon which plaintiff relies for recovery, set out in detail and minutely described. It will be noticed that no mention is made of any injury to plaintiff's eyes; nor is there any allegation in the complaint from which it could be reasonably inferred that her eyes were injured at the time the collision in question occurred, or that they afterwards, as a result of the injuries received, became diseased and the sight impaired. When the evidence on this point was offered, and objections made thereto, counsel for plaintiff stated to the trial court that they did not claim that there

"was any direct injury to her eyes;" and, further, that "the disease has developed even since this suit was commenced with more or less rapidity." If plaintiff, at the time she commenced her action, was not aware that she had received injuries which later on would produce a disease to her eyes, how can it be said that defendant was bound to anticipate that consequences of this character might result from the injuries described, and damage be claimed therefor, especially in view of the fact that plaintiff had specifically pointed out in her complaint the injuries received and had in detail alleged the particular consequences flowing therefrom upon which she based her claim for damages? The very purpose of written pleadings on the part of the plaintiff is to advise the defendant of the nature and extent of the claim made against him, and thereby give him an opportunity to prepare to meet it at the trial if he so desires. This doctrine is well illustrated by Mr. Pomeroy, in his work on Code Remedies, at section 554, in the following language: "The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it if possible at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement therefore that the cause of action or the affirmative defense must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading."

Tested by this rule, which is founded upon the fundamental principles of written pleadings in civil actions, the complaint, as framed, was no notice to the defendant that damage for injuries to plaintiff's eyes would or might be claimed. Therefore defendant was not bound to anticipate and be prepared to meet a claim of such a character. We do not wish to be understood as holding that in personal injury cases the plaintiff must in his complaint describe in detail every bruise, sprain, and wound he may have suffered because of the wrongful act complained of in order to introduce proof thereof. Nor do we mean to say that the plaintiff cannot, under the general allegations of his complaint, introduce proof of all damages that usually and ordinarily result from the wrongful act alleged, or from the nature and kind of injuries described. What we do say is this: Where, as in this case, the particular injuries and the consequences resulting therefrom upon which the plaintiff relies for a recovery are specifically alleged and pointed out, he cannot prove and recover for an element of damages not alleged, and which could not be rea-

sonably inferred as flowing from the injuries described in the complaint. Respondent, however, insists that the evidence in question was admissible under the general allegation that the plaintiff "has been incapacitated from performing her daily work as a cook and housewife." The loss of respondent's eyesight would, it must be conceded, incapacitate her from performing her daily work as a housewife. So would the amputation of her arms, which she alleges were bruised and sprained. But we do not think it would be seriously contended that if, as a result of the injuries to plaintiff's arms, amputation had become necessary to save her life, this could be proved under the allegations of the complaint as framed. And yet, as we view the complaint, proof of amputation would be more nearly within the issues than the evidence under consideration, because injury to the arms is alleged, whereas there is no mention of any disease or injury to the eyes, nor is there any allegation from which such injury can reasonably be inferred. It is therefore an element of damages which the defendant could not reasonably be expected to have anticipated and be prepared to meet from the facts alleged.

Counsel for respondent, in support of their contention that the evidence was admissible, cite and rely on the case of Croco *v.* O. S. L. R. Co., 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285. In that case, which was an action for personal injuries, the plaintiff was permitted to testify that his memory was not so good after the accident as it was before, and that he could not see out of his right eye. On appeal, this court held that, under the allegations of the complaint, it was not error for the trial court to admit evidence of this character. By an examination of the record in that case, it will be seen that the allegations of the complaint were general in character, and not specific, as in this case. The complaint in that case, after reciting the facts constituting the alleged negligence of the defendant, contained the following general allegation: "The said plaintiff became greatly and permanently injured, cut, and disfigured in and upon his head, back, arms, and legs, and received injuries in other parts of his body, and was internally injured in the region of his back and abdomen, and thereby * * * plaintiff became sick, sore, and disordered and crippled for life, from which injuries the said plaintiff suffered great mental distress and physical pain," etc. According to the great weight of authority, the plaintiff, under these allegations, was entitled to prove all damages suffered by him that ordinarily and usually flow from injuries of the character therein described, and it was proper for the trial court to admit evidence of the impairment of plaintiff's memory and injury to his eyes which were the natural and direct result of the wrongful acts alleged and of the injuries described. But the complaint under consideration does not contain averments of such general character. What counsel contend are such general averments are

allegations which relate to and specifically point out the consequences of the injuries described. We recognize and approve the well-settled rule that, where a complaint in a personal injury case contains general as well as specific allegations of the injuries received and of the damages resulting from such injuries, the plaintiff is not limited in his proof to the injuries specifically alleged, but may prove any and all damages which usually and ordinarily flow from injuries of the kind and character described in the general averments of the complaint. In the case under consideration, however, as we have hereinbefore pointed out, the injuries received, as well as the consequences resulting therefrom for which damages are claimed, are specifically alleged and enumerated, and there being no general averments of the character indicated, in fairness to the defendant, the plaintiff should have been limited in her proof to the injuries alleged in her complaint. This was not done. Permitting the plaintiff to introduce the evidence objected to naturally tended to take the defendant by surprise and to prove an element of damages of which it had no notice. 2 Southerland on Damages (3d Ed) 421; Thompson *v.* St. L. & S. Ry. Co., 111 Mo. App. 465, 86 S. W. 465; Arnold *v.* City of Maryville, 110 Mo. App. 254, 85 S. W. 107; Internat'l & G. N. R. Co. *v.* Thompson (Tex. Civ. App.) 37 S. W. 24; G. C. & F. Ry. Co. *v.* Warlick, 1 Ind. T. 10, 35 S. W. 235; Piltz *v.* Yonkers R. Co., 83 App. Div. 29, 82 N. Y. Supp. 220; Sealey *v.* Met. St. Ry. Co., 78 App. Div. 530, 79 N. Y. Supp. 677; Dittmon *v.* Edison Elec. Illum. Co., 87 App. Div. 68, 83 N. Y. Supp. 1078; Goeghegan *v.* Third Ave. R. Co., 51 App. Div. 369, 64 N. Y. Supp. 630; Kleiner *v.* Third Ave. R. Co., 162 N. Y. 201, 56 N. E. 497.

It follows from what we have said that the court erred in admitting the testimony in question, and, as it could not have been other than prejudicial to the interests of appellant, the case must be reversed. It is so ordered. The trial court is directed to permit the parties to amend their pleadings should they so desire. Costs of this appeal to be taxed against respondent.

STRAUP and FRICK, JJ., concur.

ST. LOUIS, I. M & S. RY. CO. *v.* GREEN.

(Supreme Court of Arkansas, Jan. 13, 1908.)

[107 S. W. Rep. 168.]

Carriers—Carriers of Passengers—Care Required.*—A carrier is bound to use the highest degree of care in the management of its trains, because in that respect a passenger can do nothing to insure his own personal safety.

Same—Duty to Help Passengers on Train.†—Where there were no unusual difficulties at the place of entry to a train, and a passenger carrying a child was attended by two friends, who could reasonably be expected to assist her, if necessary, there was no duty devolving on the railroad company to assist her; and, where its employee voluntarily undertook to render assistance, he was bound to use only ordinary care.

Appeal from Circuit Court, Clark County; J. M. Carter, Judge.

Action by Mattie E. Green against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The plaintiff, Mattie E. Green, filed her complaint in the Clark circuit court, alleging that the defendant, St. Louis, Iron Mountain & Southern Railway Company, is a railroad corporation

*See extensive note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7; foot-notes appended to Kline *v.* Santa Barbara Consol. Ry. Co. (Cal.), 25 R. R. R. 41, 48 Am. & Eng. R. Cas., N. S., 41; foot-notes appended to Forsythe *v.* Los Angeles Ry. Co. (Cal.), 24 R. R. R. 447, 47 Am. & Eng. R. Cas., N. S., 447; foot-notes appended to Chicago, etc., Ry. Co. *v.* Stibbs (Okl.), 24 R. R. R. 427, 47 Am. & Eng. R. Cas., N. S., 427; foot-notes appended to Marable *v.* Southern Ry. Co. (N. Car.), 24 R. R. R. 418, 47 Am. & Eng. R. Cas., N. S., 418; foot-notes appended to Illinois Cent. R. Co. *v.* Johnson (Ill.), 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; foot-notes appended to Mobile, L. & R. Co. *v.* Walsh (Ala.), 24 R. R. R. 114, 47 Am. & Eng. R. Cas., N. S., 114; foot-notes appended to Farrell *v.* Great Northern Ry. Co. (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408; Chicago City Ry. Co. *v.* Shreve (Ill.), 23 R. R. R. 444, 46 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to Louisville & N. R. Co. *v.* Mulder (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66; foot-notes appended to MacFeat *v.* Philadelphia, etc., R. Co. (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56.

†For the authorities in this series on the subject of the duty of the carrier to assist passengers to board cars or alight therefrom, see foot-notes appended to Illinois Cent. R. Co. *v.* Allen (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 149; Illinois Cent. R. Co. *v.* Cruse (Ky.), 21 R. R. R. 145, 44 Am. & Eng. R. Cas., N. S., 145, duty to assist infirm passenger to alight, Williams *v.* Louisville & N. R. Co. (Ala.), 25 R. R. R. 92, 48 Am. & Eng. R. Cas., N. S., 92, duty to render special assistance to infirm passenger; extensive note, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904.

operating a railroad which passes through Witherspoon, in Hot Spring county, Ark.; that plaintiff, on the 11th day of August, 1906, undertook to board its southbound passenger train for Arkadelphia, before it had pulled up to the station, by direction of an employee of the defendant; and that said employee was careless and negligent in assisting her to get upon said train, causing her to fall, wrenching her back, etc., causing her to be unable to use her left arm and to perform her household duties, and causing great pain and suffering—and prayed for damages in the sum of $3,000 and for other relief. The defendant denied each and every material allegation of the plaintiff's complaint, and set up that, if the plaintiff was injured at all, it was by reason of her own contributory negligence, and prayed to be discharged, having answered. This cause came on for hearing, before a jury duly impaneled, on the 11th of February, 1907, at the January term of the Clark circuit court, and the following testimony was introduced:

Mrs. Mattie E. Green, the plaintiff, being first duly sworn and examined, testified in substance as follows, to wit: That she is the plaintiff; lives at Witherspoon, a station on the defendant company's line of railroad; is a married woman. Witherspoon is about five miles from Arkadelphia. That she was at the station for the purpose of getting on the train on August 11, 1906, to take passage to Arkadelphia, Ark., and was injured there. That there was a platform at the station, and when she started to board the train she did so under directions from a man in the uniform of a railroad man. The platform is pretty long. That there were two fellows getting on the darkey coach, and she though she would get on there and walk through. The platform is on the right-hand side, or, she thinks, her left-hand side; east side, she thinks, in coming to Arkadelphia. That they did not pull her coach up to the platform, when it reached there. The first passenger coach was the darkey coach, and that reached the platform. The white coach did not reach the platform, although it was just behind the black coach. She was standing in the middle of the platform, when the train reached the station. That she was told to get on down at the white coach, and get on in a hurry, when she started to get on the darkey's coach. That she offered the man her baby, and started to get on; and he gave her a push, and she started to make a step, and fell, and swung there on one arm. That she started to get on the south end of the passenger coach. That her baby was in her right arm, and when she was shoved she caught on to the handhold with her left arm. That Mrs. Allen, who was with her, tried to assist her. That she was trying to get up the steps at the time. That he gave her a shove and turned her loose. That the weight of the baby on her arm caused her to fall back when he turned loose of her. That she commenced falling backwards, and swung

around on the handhold, facing north, the way the train had come. That she was hurt by falling backwards. It hurt her arm and back. That she has had medical assistance, and has suffered nearly all the time with it. That her back was hurt. Other testimony was adduced by her, tending to corroborate her statements and to show the extent of the injuries received by her.

Mr. Hawkins, a witness for the defendant testified as follows: That he is a brakeman on the Iron Mountain, on trains Nos. 805 and 806, what is known as the "short train;" knows Witherspoon station. They pass there in the morning going south. That they carry a step box to assist passengers to get on and off that train with, and are never without it; does not remember any occasion when this plaintiff claims to have been hurt by swinging around on the steps. That he does not remember having helped some ladies on about the 11th. That there was nothing about that time that would indicate that there was any trouble or any injury to a lady. That if there had been he would have remembered it. That there was nothing that attracted his attention. That if a lady had gotten hurt, he would have taken note of it. That, when they do not stop at the platform, they put the step box down, and it makes it as high as the platform. The testimony shows that the place where plaintiff got on the train was a smooth cinder platform, raised to the level of the tracks, and about 30 or 40 feet long.

There was a verdict and judgment for plaintiff, and defendant has appealed.

T. M. Mehaffy and *J. E. Williams,* for appellant.
Jas. E. Callaway, for appellee.

HART, J. (after stating the facts as above). Appellant claims that the first instruction given by the court was erroneous. The instructions are as follows: "You are instructed that the defendant railway company, if it undertook to render plaintiff assistance, was bound to the highest degree of care in securing the safety of the plaintiff in boarding its train, which is that degree of care which a very prudent person would have exercised under the circumstances; and if you find from the evidence that the defendant railway company, through its servants or employees, did undertake to assist plaintiff to board the train, failed to discharge this duty, and plaintiff was injured thereby, your verdict should be for the plaintiff." Counsel for appellee, to sustain the instruction, quotes the following: "The carrier is bound to exercise care in securing the safety of passengers while boarding or alighting from its cars or other conveyances, and the degree of care required in the discharge of this duty is the highest care, or that degree of care which a very prudent person would have used under the circumstances." 6 Cyc. 611, and notes.

A reference to cases cited in the notes will show that the

doctrine announced applies only where there is some unusual danger or difficulty arising from the place or means afforded for entering or alighting from a train. This is but an application of the principles laid down by this court in the case of Railway *v.* Rexroad, 59 Ark. 185, 26 S. W. 1037. The rule is that the carrier is held to the highest degree of care in the management of its trains, for the reason that in that respect the passenger can do nothing to insure his own personal safety. In the present case there were no unusual difficulties. Appellee was attended by two friends, who could reasonably be expected to assist her with her child, if any assistance was needed. There was a smooth cinder platform, on a level with the rails, and stool upon which to mount to the first step. The train stopped at the usual place. Under the circumstances there was no duty devolving upon appellant to assist appellee in entering the train. 2 Hutchinson on Carriers, §§ 1112, 1127; 6 Cyc. p. 611, and notes; Yarnell *v.* Railway, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

But it is admitted that the brakeman attempted to assist her. Having undertaken a duty that it was not required to perform, the carrier was only bound to use ordinary care in discharging that duty. It is like the kind of care that is required in respect to station arrangements. In the case of St. L., I. M. & S. Ry. Co. *v.* Fairbairn, 48 Ark. 493, 4 S. W. 50, Cockrill, C. J., said: "But the company is bound to use ordinary care to keep its platforms in a safe condition for the benefit of those who have the legal right to go upon them."

For the error in giving the first instruction, the case is reversed and remanded.

HOLDEN *v.* GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Jan. 10, 1908.)

[114 N. W. Rep. 365.]

Carriers—Injury to Passengers—Damages.*—The plaintiff's intestate was a passenger on the defendant's passenger train, and was carried past his station under circumstances likely to disturb his judgment, through no fault of the defendant. The conductor told him that the train was in the yards, going slowly, and he could jump off, and directed him so to do. Thereupon he attempted to alight from the moving car and was killed thereby. Held, that the question of his contributory negligence was one of fact, and if it was submitted to the jury, and, further, that the damages awarded are not excessive.

(Syllabus by the Court.)

Appeal from District Court, Swift County; G. E. Qvale, Judge.

Action by Ralph Holden, Sr., administrator of Ralph Holden, Jr., against the Great Northern Railway Company. Verdict for plaintiff. From an order denying motion for judgment or a new trial, defendant appeals. Affirmed.

James D. Armstrong, for appellant.
Geo. W. Champlain and *F. E. Latham,* for respondent.

START, C. J. On October 29, 1906, at about 1 o'clock p. m., the plaintiff's intestate was killed while attempting to alight from defendant's passenger train when it was in motion. This action was brought in the district court of the county of Swift to re-

*For the authorities in this series on the question whether it is contributory negligence on the part of a passenger to alight from a moving train or street car at the direction or invitation of an employee of the carrier, see note, 12 Am. & Eng. R. Cas., N. S., 164 (leaving moving train at invitation of conductor); Pence *v.* Wabash R. Co. (Iowa), 3 R. R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77; Flaherty *v.* Boston & M. R. R. (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246 (alighting from moving train, by direction of brakeman, when danger is obvious); St. Louis S. W. Ry. Co. *v.* Highnote (Tex.), 16 R. R. R. 41, 39 Am. & Eng. R. Cas., N. S., 41 (alighting from moving train, effect of conductor's agreement to slacken up enough to allow passenger to alight in safety, where he alighted when train was going too fast without the knowledge or concurrence of conductor); Southern Ry. Co. *v.* Bandy (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736 (alighting from slowly moving train, under direction of conductor is not); Staines *v.* Central R. Co. (N. J.), 17 R. R. R. 612, 40 Am. & Eng. R. Cas., N. S., 612; Johnson *v.* Atlantic, etc., R. Co. (N. Car.), 3 R. R. R. 770, 26 Am. & Eng. R. Cas., N. S., 770 (alighting from moving train at invitation of conductor); West *v.* St. Louis S. W. Ry. Co. (Mo.), 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855 (passenger directed by

cover damages for his death, on the ground that it was caused by the negligence of the defendant. Verdict for the plaintiff in the sum of $3,000. The defendant appealed from an order denying its motion for judgment or a new trial. The principal questions raised by the assignments of error are whether the deceased was as a matter of law guilty of contributory negligence, and, further, whether the damages awarded are excessive.

There was but little conflict in the evidence as to what took place just before the deceased started to leave the railway car on which he was a passenger, except that the testimony of the conductor of the train as to what he said to the deceased conflicts in some particulars with that of the plaintiff's witnesses. The credibility of the witnesses and the weight to be given to their testimony were questions for the jury. The question, then, is whether there is any evidence, taking the most favorable view of it fairly permissible for the plaintiff, to establish the essential facts upon which the verdict must rest. There was evidence fairly tending to establish these facts: The deceased was farm laborer, 23 years old, of good ability, health, and eyesight, and accustomed to riding on the cars. On the day of his death he was a passenger on the defendant's train from Morris to Hancock, where he had resided for some months. He was seated in the rear car of the train directly in front of two young ladies with whom he was acquainted, and entered into conversation with them. Being

switchman to jump from flat car, to alight, and suffering a miscarriage as the result of so alighting, was not guilty of contributory negligence in failing to inform switchman of her condition); McPeak *v.* Missouri Pac. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 226; Atchison, etc., R. Co. *v.* Hughes (Kan.), 2 Am. & Eng. R. Cas., N. S., 248; Lewis *v.* President, etc., Canal Co. (N. Y.), 2 Am. & Eng. R. Cas., N. S., 192; Cooper *v.* Georgia, etc., Ry. Co. (S. Car.), 16 Am. & Eng. R. Cas., N. S., 12 (not negligence per se); Atchison, etc., R. Co. *v.* O'Melia (Kan.), 2 Am. & Eng. R. Cas., N. S., 257; Durham *v.* Louisville & N. R. Co. (Ky.), 2 Am. & Eng. R. Cas., N. S., 260; Hodges *v.* Southern Ry. Co. (N. Car.), 8 Am. & Eng. R. Cas., N. S., 46; Jacob *v.* Flint & P. M. R. Co. (Mich.), 2 Am. & Eng. R. Cas., N. S., 258; Lehman *v.* Railroad Co. (La.), 2 Am. & Eng. R. Cas., N. S., 259; McDonald *v.* Kansas City & I. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 258; New Jersey Traction Co. *v.* Gardner (N. J.), 2 Am. & Eng. R. Cas., N. S., 259; Outen *v.* North & South St. R. Co. (Ga.), 2 Am. & Eng. R. Cas., N. S., 258; Rothstein *v.* Pennsylvania R. Co. (Pa.), 2 Am. & Eng. R. Cas., N. S., 258; Savannah, etc., R. Co. *v.* Wall (Ga.), 2 Am. & Eng. R. Cas., N. S., 260; Texas & P. R. Co. *v.* Beckworth (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 261; Victor *v.* Pennsylvania R. Co. (Pa.), 2 Am. & Eng. R. Cas., N. S., 257; Distler *v.* Long Island R. Co. (N. Y.), 6 Am. & Eng. R. Cas., N. S., 235; Young *v.* Chicago, etc., R. Co. (Iowa), 6 Am. & Eng. R. Cas., N. S., 231 (at invitation of conductor); Atchison, etc., R. Co. *v.* Hughes (Kan.), 2 Am. & Eng. R. Cas., N. S., 248 (jumping from moving train by invitation of employee); Aufdenberg *v.* St. Louis, etc., Ry. Co. (Mo.), 3 Am. & Eng. R. Cas., N. S., 323 (jumping from moving train, by order of conductor, to take up dangerous position).

so engrossed, he took no note of the passing of time or of the passing of Hancock by the train. Shortly after the train left Hancock the conductor came to the deceased, who was then kneeling on the seat in front of the ladies, facing and conversing with them, and asked him for his ticket. He replied, "You have it." The conductor then asked where he was going, and the reply was, "Hancock." The conductor replied, "We are passing Hancock." The deceased asked to have the train stopped so that he could get off. The conductor, according to the the testimony of the ladies, said, "No; the train is going slow, we are in the yards, you can jump off," but according to the testimony of another witness for the plaintiff, he said to the deceased, "We are right in the yards, get off," and assured him that the train was going slowly. The deceased then bade the young ladies goodbye, remarking that he had missed his station, and walked to the front platform of the car and onto the steps. The conductor followed him, the car gave a slight jolt, and the conductor came back into the car and pulled the bell cord. When the train stopped the deceased was found dead under the rear trucks of the car. Sufficient money was found in his pocket to have paid his fare to the next station. He made no offer to do so. The train was not in the yards, but about a mile from the station, on a fill some 18 feet in height, and so narrow that the lower step of the car was about a foot from the edge of the embankment. The car was going 10 miles an hour at the time. It was daylight. The deceased did not jump from the platform; for, if he had done so, he would have gone down the embankment and not under the car. In what manner he attempted to leave the car does not clearly appear from the evidence. The conductor testified that he "walked off the train, through the coach, off on the steps, and got off," and, on the cross-examination, that he was gone when he, the conductor, got to the platform. There were no angry words between the conductor and the deceased, and he had no reason to believe that the conductor would eject him if he did not get off the train.

The clear inference from these facts is that the conductor was guilty of negligence for which the defendant is liable, unless the deceased was guilty of contributory negligence. It was the duty of the conductor to care for the safety of his passengers. He either knew or he did not know whether his train had left the yards or was on the fill. He knew whether his train was running slowly and at a rate of speed which made it safe for a passenger to leave it, or he did not. In either case it was a breach of his duty to represent that the train was in the yards and going slowly, and to advise or direct the deceased to get off. The question as to the alleged contributory negligence is more serious and doubtful. Does the inference that he was guilty of such negligence conclusively follow, as a matter of law, from the eviden-

tiary facts established by the evidence? The general rule, as settled by the decisions of this and other courts, is that, except when the circumstances are exceptional and peculiar, only one inference can reasonably be drawn from a voluntary attempt by a passenger to alight from a moving railway train, and that it is negligence as a matter of law to do so. Jones *v.* Railway Co., 42 Minn. 183, 43 N. W. 1114; Butler *v.* Railway Co., 59 Minn. 135, 60 N. W. 1090. To bring a given case within the exception to the rule, it may be shown that the passenger was invited or directed to get off the moving train, or that he acted under apprehension of impending peril, "or that some direction was given to the passenger by those in charge of the train, or some situation created which interfered to some extent with his free agency and was calculated to divert his attention from the danger and create a confidence that the attempt could be made in safety," or that he acted under other similar circumstances. Jones *v.* Railway Co., 42 Minn. 183, 43 N. W. 1114; Butler *v.* Railway Co., 59 Minn. 142, 60 N. W. 1090; Solomon *v.* Railway Co., 103 N. Y. 442, 9 N. E. 430, 57 Am. Rep. 760.

A brief reference to a few of the adjudged cases will not be out of place. In Jones *v.* Railway Co., 42 Minn. 183, 43 N. W. 1114, the plaintiff was awakened from a sound sleep and told by the conductor that he was at his place of destination, and, while still drowsy, was directed to get off the train. It was very dark. He thought the train was moving slowly. In fact it was moving 8 or 10 miles an hour and had passed the station. It was held that plaintiff, under the circumstances, had a right to rely on the actions and conduct of the conductor, and to assume that he knew the circumstances and conditions and would not advise or direct him to jump from the train unless it was safe so to do. In Bucher *v.* Railway Co., 98 N. Y. 128, the plaintiff had a child in his arms and went out upon the car plaform before the train had come to a full stop, and while it was moving very slowly the conductor directed him to get off, and he, believing the cars would stop, did so; but they did not stop, and he was injured. The accident happened at the regular stopping place of the train, but it did not stop. Held, that defendant was liable on the ground that the conductor's conduct was such as to justify the plaintiff in concluding that he had a right to get off the train and that he could safely do as he was directed. In Galloway *v.* Railway Co., 87 Iowa, 458, 54 N. W. 447, the plaintiff went upon a vestibuled train at night to assist his wife and child aboard. The door was locked when he went to get off. The brakeman said he could not get off; that it would break his neck. The plaintiff said he would pay his fare and go to the next station. The brakeman then opened the door and told the plaintiff he could jump far enough and would be all right. The plaintiff asked the brakeman to pull the bell. He either said he could not

or would not, and further said, "You get off," and left plaintiff in the dark. The plaintiff did not know whether the train had more than left the station, and it seemed not to be going fast. He jumped from the train and was injured. The train in fact was going about 20 miles an hour. Held not error to submit questions of contributory negligence and whether the brakeman was in charge of the car to the jury. In Georgia R., etc., Co. *v.* McCurdy, 45 Ga. 288, 12 Am. Rep. 577, a passenger was carried beyond the stopping point. The train did not come to a stop at that place, but slackened speed, and the plaintiff went to the conductor to get him to stop the train. The plaintiff was a heavy man and was afraid to alight while the train was moving. The train slackened speed for him to get off. Under directions of the conductor, he got off and was injured. The defendant was held liable. In Louisville & Nashville R. Co. *v.* Crunck, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, the plaintiff boarded a train to assist a sick person to a seat. The defendant knew this, but started the train before the plaintiff was off. The speed of the train was 4½ miles an hour when he alighted. Held, that it was not negligence per se to leave the moving train. In South & North Alabama Ry. Co. *v.* Schaufler, 75 Ala. 136, the plaintiff stepped from a train, on a dark night, when it was moving at the rate of 6 or 8 miles an hour, and before it had reached the platform of the regular station. The plaintiff had no reason to believe that the train would not stop at the usual place, with which he was acquainted. The conductor had said to him, "Hurry up! We have no time." Held, that advice on the part of the conductor cannot be held to excuse an act of negligence on the part of an adult passenger which would be so opposed to common prudence as to make it an obvious act of recklessness. If the danger was not apparent to a person of reasonable prudence, and the passenger acts under such advice, it becomes a question for the jury to say how far the passenger's negligence may be excused.

Now, in the case at bar the jury might have reasonably inferred, from the evidentiary facts which the evidence tended to establish, that the deceased was embarrassed and his judgment somewhat disturbed when he found that he had been carried by his station under the circumstances stated; that he relied, and had a right to rely, upon the representations of the conductor that the train was in the yards, going slowly, and that he could jump off, an assurance that he could safely do so, and to act upon the conductor's advice and direction to get off the train, until he was advised, by the use of his senses, to the contrary; that the situation was such that he was required to act quickly and hasten to get off; and, further, that it was not until he was on the steps of the car that he knew and appreciated that the conductor had misled him, when it was too late to save himself and

he fell or was thrown from the step by a jolt of the car or its increasing speed. The evidence indicates with reasonable certainty that he did not step or jump from the car; for, if he had done so, it would be reasonable to infer that he would have fallen down the embankment. While this is a border case, yet we are of the opinion that fairminded men might draw different conclusions from the evidence. We hold that the evidence does not show, as a matter of law, that the plaintiff's intestate was guilty of contributory negligence, that the question was properly submitted to the jury, and that the verdict is sustained by the evidence.

The deceased was a young, unmarried man, 23 years old, of good habits, and sound of body and mind, and left, him surviving, a father and mother of the age of 64 and 59 years respectively, with whom he shared a part of his earnings. The damages awarded are liberal, but in our opinion not excessive.

Order affirmed.

BLUE GRASS TRACTION CO. *v.* SKILLMAN.

(Court of Appeals of Kentucky, June 4, 1907.)

[102 S. W. Rep. 809.]

Carriers—Injury to Passenger in Alighting—Negligence of Conductor.*—Where, on a dark night, the conductor of an electric car twice announced a station, and then opened the door and went onto the platform, and a passenger, ignorant, though exercising ordinary care, of the fact that the car was still moving, the current having been turned off at the top of a grade and the movement of the car being so smooth that a person would not notice it, followed him onto the platform, passed by him down the steps, and was injured in attempting to alight, the carrier is liable; the conductor having failed to warn her, though he knew her danger, or by the exercise of ordinary care should have known it, and he being bound to know, under the circumstances, that she followed him for the purpose of alighting.

Appeal—Rulings on Pleadings—Harmless Error.—Where any defect in the petition was one of form merely, and there was a fair trial on the merits, the overruling of the demurrer to the petition will not be reviewed.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to discharging passengers, see foot-notes appended to Hanlon *v.* Central R. Co. of New Jersey (N. Y.), 22 R. R. R. 813, 45 Am. & Eng. R. Cas., N. S., 813; foot-notes appended to Atchison, etc., Ry. Co. *v.* Calhoun (Okl.), 22 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791.

Blue Grass Traction Co. *v.* Skillman.

Appeal from Circuit Court, Bourbon County.
"Not to be officially reported."

Action by Mamie Skillman against the Blue Grass Traction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

B. D. Berry and *Morton, Webb & Wilson,* for appellant.
Dennis Dundon, for appellee

HOBSON, J. In October, 1905, Mrs. Mamie Skillman, with her uncle W. H. Mappin, and his wife, were passengers on a car of the Blue Grass Traction Company from Paris to a station known as No. 56, or the city limits. When they got near the station the conductor called out the station, and when they got still nearer he called it out a second time. Her uncle then got up. The conductor came down the aisle going towards the door, and asked her uncle to step aside, which he did, and, as the conductor went on to the door, Mrs. Skillman followed him; her uncle and aunt following her. When the conductor got to the door, he opened the door and stepped outside upon the platform. It was 10 o'clock at night, and dark. Mrs. Skillman, supposing that the car had stopped, walked down the steps and stepped off, unconscious that the car was moving. She was severely hurt, and brought this suit to recover for her injury. The jury found for her, fixing the damages at $530. The court entered judgment upon the verdict, and the defendant appeals.

The car was running downgrade. The current had been turned off at the top of the grade, and it was running so smoothly that Mrs. Skillman was not conscious of the motion. Just as she was stepping off, her uncle, seeing that the car was in motion, called to her; but it was too late. The car ran about 60 feet after her fall. The conductor was standing right at the door as she went out, and testified that as she came out he said to her, "Look out! wait until the car stops." But in this he is contradicted by all the other witnesses, who say that he said nothing. The conductor was bound to know, when the people followed him to the door, after he had announced the station and opened the door for them, that they were coming out of the car for the purpose of alighting, and it was incumbent upon him to warn them of the danger; for he knew the car had not stopped, and he could not but know, from their actions, that they were coming out to get off. Mrs. Skillman passed right by him as she went down the steps to get off. He could see plainly that she was going to get off, if he had paid attention to what was going on. It was incumbent upon him under the circumstances to pay attention, as it was dark and the car was moving so smoothly that a person would not perceive the danger. The court did not, therefore, err in overruling the defendant's motion for a peremptory instruction.

The instructions of the court to the jury were in effect as follows: (1) That they should find for the plaintiff if they believed from the evidence that the conductor knew the car was in motion, or by the exercise of ordinary care could have known it; that the plaintiff did not know it; that the conductor opened the door and took his place where it was customary for conductors on the line to take their place when the cars were stopped to allow passengers to alight; that the plaintiff relied upon his actions as an invitation to alight from the car, and believed from such actions that she could then and there leave the car with safety; and that in so doing she acted with the care and prudence that an ordinarily prudent person would exercise under the circumstances. (2) That the conductor was not bound to anticipate that she would attempt to alight from the car while in motion, and before they could find for the plaintiff they must believe from the evidence that, after he discovered her intention to alight from the car while in motion, he failed to warn her against the danger in time to prevent the accident. These instructions were as favorable to the defendant as it was entitled to, and the evidence is sufficient to justify the verdict of the jury under them.

Appellant relies on Berry *v.* L. & N. R. R. Co., 109 Ky. 736, 60 S. W. 699, Durham *v.* L. & N. R. R. Co., 29 S. W. 737, 16 Ky. Law Rep. 757, Hughlett *v.* L. & N. R. R. Co., 22 S. W. 551, 15 Ky. Law Rep. 178, Adams *v.* L. & N. R. R. Co., 82 Ky. 608, I. C. R. R. Co. *v.* Hanberry, 66 S. W. 417, 23 Ky. Law Rep. 1867, and England *v.* B. & M. R. R. Co., 153 Mass. 490, 27 N. E. 1; but none of these cases are like this. Here the appellee was ignorant of the danger, and, as found by the jury, exercised ordinary care. The conductor knew of her danger, or by the exercise of ordinary care should have known it, and negligently failed to warn her of the danger.

It is needless for us to determine whether the court properly overruled the demurrer to the petition. If there was any defect, it was a matter of form, and not of substance, and it was cured by the answer, verdict, and judgment. No error, not affecting the substantial rights of the party complaining, is ground for setting aside a judgment. The case was fairly tried on the merits, and no substantial right of appellant was prejudiced. For such defects as are here in question the court will not inquire whether a demurrer was properly overruled, where the merits of the case have been tried, and the matters relied on to show that the petition is defective were supplied by the proof and the verdict. Hill *v.* Ragland, 114 Ky. 109, 70 S. W. 634.

Judgment affirmed.

BROOKS *v.* PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, April 22, 1905.)

[66 Atl. Rep. 872.]

Carriers—Duties—Carriage of Passengers.*—It is the duty of a carrier to announce the name of the station as the train approaches it, and to afford a passenger sufficient time and opportunity to alight in safety.

Same—Injuries to Passenger.—In an action against a railroad company by a passenger to recover damages for personal injuries in alighting from a train, evidence held to require submission of question of defendant's negligence to the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edward Brooks, Jr., administrator of George W. Hamilton and Clara Amelia Hamilton, against the Philahelphia & Reading Railway Company. From an order refusing to take off a nonsuit, plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Edward Brooks, Jr., Frederick J. Geiger, and *Edgar Dudley Faries,* for appellant.

Gavin W. Hart, for appellee.

MESTREZAT, J. On January 1, 1903, Clara Amelia Hamilton, one of the plaintiffs, was a passenger on the defendant company's train leaving the Reading terminal in the city of Philadelphia about 6 o'clock in the evening. Her destination was Lafayette station, at which the train was due about 6:30 that evening. After the train left the station, the plaintiff surrendered her ticket to the conductor. The train did not stop at Lafayette station, and, as it was passing, the plaintiff stepped to the door of the coach in which she was riding and told the brakeman that she desired to alight at that station. He replied that the train had not yet arrived at the station, which she insisted was not true. While they were talking, the conductor came running through the car and said that he had forgotten to notify the brakeman to stop the train at Lafayette station, and that the train would then stop, which it did, about 100 yards beyond Lafayette station. It was then dark, and plaintiff told the conductor and brakeman that she preferred being let off at the platform; but the brakeman said he would assist her to alight there. She

*See preceding case, and foot-note.

then attempted to alight from the train, and testified that, "when getting down, in some manner my left limb twisted, and caused a rupture, for which I have suffered ever since." At the time of the accident, Mrs. Hamilton was 65 years of age, and was a large woman. The brakeman was a tall, stout man, and stood on the ground, and assisted Mrs. Hamilton to alight. In her testimony she describes the manner in which she left the coach as follows: "Well, his [brakeman's] head, I suppose, was on a level with my knee about, and I had to lean over this way and put my hands on his shoulder to get down. It was all of four feet that I had to jump—four feet and one-half." This action was brought to recover damages for the injuries sustained by Mrs. Hamilton by reason of the alleged negligence of the defendant company. The plaintiff alleges that the servants of the carrier company were negligent in not stopping the train and permitting her to alight at Lafayette station, her destination, and in causing the train to stop beyond the station and compelling her to alight at an improper and unsafe place, and that her injuries were the direct result of such negligence. At the conclusion of the plaintiff's testimony the learned trial judge, on motion of defendant's counsel, entered a nonsuit; and the reason therefor was stated as follows: "I will enter a nonsuit in this case. The plaintiff says in getting down she twisted herself somehow. There is no evidence whatever as to how she twisted herself, or what caused her to twist herself."

The contract of a passenger with a railroad company, as evidenced by his ticket, requires the company to carry him safely to his destination and to give him an opportunity to alight at the usual stopping place. It is the duty of the carrier to announce the name of the station as the train approaches it, and on the arrival of the train at the station to afford the passenger sufficient time and opportunity to alight in safety. The passenger's contract does not terminate until he has alighted from the cars. St. Louis, etc., Ry. Co. *v.* Finley, 97 Tex. 85, 15 S. W. 266. At the end of the journey the relation of the carrier and passenger continues until the passenger has had a reasonable opportunity to depart from the train or car in safety. 6 Cyc. 541. In the very recent (third) edition of Hutchinson on Carriers (section 1122) the duty of railway carriers of passengers is defined as follows: "As has already been shown, railway carriers of passengers must provide safe platforms and other necessary facilities for access to and for alighting and egress from its trains by their passengers, and their duty in this regard has been indicated, as far as it can be done, from the adjudicated cases. Having provided such platforms, they are required to be careful to bring their coaches up to them in such manner that their passengers may be afforded the opportunity safely to alight upon them; and if the passenger be called upon to leave the coach before this has been done, or if

he is reasonably induced to believe, from the circumstances or from the conduct of those in management of the train, that it has been halted in order that the passenger may there alight, and that no other or better opportunity will be given him to do so, and in undertaking to leave the conveyance, with due care and discretion, he receives an injury from the want of the proper facilities for doing so, or by reason of the dangerous character of the ground, the carrier will be held responsible for its negligence." And in a subsequent section (1126) it is said: "Carriers must be equally careful not to pass beyond the alighting platform or station, and thus to require or make it necessary for the passenger to alight without returning to it." In Englehaupt *v.* Erie Railroad Co., 209 Pa. 182, 58 Atl. 154, it is said: "It is the duty of a carrier, not only to exercise the strictest vigilance in receiving and conveying a passenger to his destination, but also to set him down safely at a station at the termination of his journey." And in Case *v.* Deleware, Lackawanna & Western Railroad Co., 191 Pa. 450, 43 Atl. 319, where, as here, the train passed the station and the plaintiff alighted some distance beyond the platform, Chief Justice Sterrett, in reversing a judgment for the carrier company, said (page 456 of 191 Pa., page 320 of 43 Atl.): "The duties of common carriers of passengers, under circumstances such as the evidence in this case tends to establish, are too plain to require either comment or citation of authorities. If the failure of the defendant to perform its duty to the plaintiff as a passenger was the proximate cause of the undoubtedly serious injury which she sustained in attempting to reach the station plattorm, she is entitled to recover adequate compensation in damages, unless she was guilty of negligence which contributed to her injuries."

From these authorities, defining the duty of railway carrier towards its passengers, it clearly appears that it was the duty of the defendant company, under its contract with Mrs. Hamilton, not only to carry her from Philadelphia to Lafayette station, but to announce the name of the station as the train approached, and to stop at the station and give her sufficient time and opportunity to alight in safety. Having failed to perform this well-defined duty, the carrier was guilty of negligence for any injury which proximately resulted from that failure of duty. This was a nonsuit in the court below, and the plaintiff is entitled to have the facts, as shown by her testimony, taken as verity, together with all the reasonable inferences to be drawn therefrom. The station was not announced as the train approached, nor did the train stop at the station; the reason presumably being that the conductor, as he said, had forgotten to direct the brakeman to stop it. The plaintiff did not request to be let off at the place where the train stopped. On the contrary, she suggested to the con-

ductor and the brakeman that she preferred to be put off at the platform. To this the brakeman said that he would assist her to alight at that place. Leaving the coach at the place where the train stopped, therefore, was not her voluntary act, but was done after at least an implied request and a refusal by the company's servants to return the train to the station. So far as the evidence discloses, this was her only opportunity for alighting from the train so as to reach her destination. The train was halted there for the express purpose of permitting her to alight, and her attempt to do so, under the circumstances disclosed by the uncontradicted testimony, involves no wrong or want of care on her part.

We are told, however, by the learned trial judge, that a recovery cannot be permitted because she has not shown "how she twisted herself, or what caused her to twist herself." In the language of Mr. Justice Strong in Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, "such refinements are too minute for rules of special conduct." The plaintiff has described the succession of events from the time of the carrier's negligent act in carrying her beyond the station until she was injured in alighting from the train. She described minutely, as will be observed, how and where she left the coach and how she was injured in doing so. There was sufficient evidence to warrant the jury in finding that the place the carrier's servants required her to alight was unsafe and dangerous. There was no platform or other appliances there to enable a passenger to alight safely. She placed her hands upon the shoulders of the brakeman, and then stepped or jumped to the ground, which was a distance of from 4 to 4½ feet. This act, it is shown, resulted in her serious injury, described by the physician as inguinal rupture. The physician testified that "anything that produced an extraordinary strain on the contents of the abdomen, or weakens the walls of it, or distends it, will produce rupture," and that her condition could undoubtedly have been produced by such an accident as she described on the witness stand. The twist of the limb occurred while she was alighting from the train, and, if that caused the rupture, then the fact that the limb was twisted was sufficient, without any further description of how it was done. It is not alleged that she did not use care in stepping from the car, or that her limb was twisted by the failure to observe care in the act of stepping from the coach. She says: "When getting down, in some manner my limb twisted, and caused a rupture." We think this was sufficient, in view of the fact that she detailed the manner of her leaving the coach. Common experience teaches that, under such circumstances, it is often difficult to describe in greater detail what produced the results of the accident. In this case the testimony, if believed, shows that the accident to the plaintiff, caused

by being required to alight from the train at an improper place, resulted in rupture, and we think the learned court was clearly in error in requiring as a condition precedent to a recovery, a minute description of each move and twist of the plaintiff's body resulting in her injury.

The assignments of error are sustained, and the judgment is reversed, and a procedendo is awarded.

GREEN *v.* PITTSBURG, M. & G. ST. RY.

(Supreme Court of Pennsylvania, Jan. 6, 1908.)

[68 Atl. Rep. 675.]

Carriers—Injury to Passenger—Evidence.—The electric controller of a summer car blew out, and, after the car had stopped, a passenger was found lying on the ground some 15 feet back from the rear end of the car. There was no evidence to show how she came there. Held, in an action by her to recover for injuries received, a nonsuit was properly entered.

Appeal from Court of Common Pleas, Westmoreland County.

Action by Bridget Green against the Pittsburg, McKeesport & Greensburg Street Railway Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James L. Kennedy, Joseph A. McCurdy, and *J. E. B. Cunningham,* for appellant.

James S. Moorhead and *Robert W. Smith,* for appellee.

STEWART, J. Not only was the evidence adduced on behalf of the plaintiff insufficient to warrant an inference that plaintiff's injuries were received in the way alleged in the statement of claim, but it left the immediate and proximate cause of the accident wholly undisclosed. The plaintiff had been a passenger on one of the defendant company's open summer cars, occupying a seat in one of the transverse rows back of the middle of the car, and near the end of the row. It was at an early hour in the night-time, and there were some 15 or 20 other passengers in the car. Suddenly and without warning, the electric controller on the rear platform burned or blew out with something of a report, followed by a display of electricity at the rear end of the car. The car was proceeding at a moderate rate, as it was approaching a crossing where certain passengers expected to alight. Many of

the passengers, if not all, left the car, because of the electric disturbance before it came to a stop. When the stop was made, the plaintiff was found lying upon the ground some 15 feet back from the rear end of the car. In the statement filed, the cause of action is declared to be defendant's negligence in "permitting the electric machinery of said car to become so deranged and out of order, thereby setting fire to said car and charging said car with electricity," and "neglecting to stop said car to permit plaintiff to escape danger. Whereupon and by reason of defendant's carelessness, plaintiff was violently and suddenly thrown from said car," etc. With respect to the negligence charged because of failure to stop the car, it is only necessary to say that there is no evidence from which the jury could have found that the car was not stopped with reasonable promptitude under the circumstances. It may be conceded in regard to the defective controller, only for the purposes of this case, however, that a presumption of negligence attends the blowing or burning out of a controller of an electric street car. Had the plaintiff averred, and offered evidence in support, that she was injured as the direct result of the defective working of the controller as by burning, or in some other way as the result of an intervening cause which was put in operation in consequence of the action of the controller, without fault of her own, with the presumption of negligence on part of the defendant attending, her case must have gone to the jury. But there was neither averment nor proof of any such facts. The averment was that, by reason of negligence in connection with the controller, plaintiff was violently and suddenly thrown from the car, and thereby severely injured. The evidence affords no explanation of how she escaped from the car. The injuries she claims to have suffered were manifestly occasioned by a fall. But what was the immediate operating cause that produced the fall? Certainly not the burning out of the controller or the escaping fluid. Such a result is not contended for. In her testimony plaintiff does not pretend to explain how, or in what manner, or from what cause she fell; nor does a single witness called on her behalf, for the reason that no one seems to have seen her alight from her car. The plaintiff herself testifies that she saw the electric disturbance, saw passengers rise in seats; that she arose from her seat, and stood, holding to the back of the seat immediately in her front; and that she has no recollection of anything that occurred after that until she became conscious of her injury when on the ground. It is quite obvious that between the burning of the controller and plaintiff's fall there must have been an intervening, operative cause. What this was nowhere appears, except as the suggestion is made in appellant's argument that the plaintiff fell while attempting to escape from a peril to which she had been exposed through defendant's negligence. This may be a true explanation. That it is not an unreasonable conjecture is the most that can be said in

its favor. Several possible explanations quite consistent with the evidence could be advanced, which if lacking equal probability would be none the less reasonable, some of them suggesting causes wholly independent of defendant's alleged negligence. Was it for the jury to speculate as to what the intervening cause was, without the slightest suggestion to be found in the evidence that would support one inference rather than another? A verdict under such circumstances as was said in Railroad Company *v.* Schertle, 97 Pa. 450, a case presenting much the same features as this, would have no better foundation than a guess, or, at most, mere possibilities, and this will not do. To the same effect is Trout *v.* Turnpike Company, 216 Pa. 119, 64 Atl. 900. There we said: "The burden in such cases is always on the plaintiff to show the causal connection between the accident and the negligence alleged. This may be done by showing facts and circumstances from which the connection may be inferred by process of rational deduction, but never by speculation." We have indicated sufficiently the defect in plaintiff's cause as submitted. Judgment of nonsuit was properly entered.

Judgment affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. *v.* HAWKINS.

(Supreme Court of Alabama, Nov. 19, 1907.)

[44 So. Rep. 983.]

Carriers—Street Railways—Duty Towards Boarding Passengers.* —Though a street car must be held stationary until those desiring to enter are on the car and reached a place of safety, under ordinary conditions the passenger is considered as having reached a place of safety when he is on the car, and it is not negligent to start the car in the usual manner and without any unusual jerk while a passenger is stepping from the platform into the car.

Same—Action for Injuries—Instructions.—In an action for injury

*For the authorities in this series on the question whether it is negligence to start a street car while a passenger is attempting to board car, find a seat, or alight, see Snipes *v.* Norfolk & So. R. R. (N. Car.), 23 R. R. R. 53, 46 Am. & Eng. R. Cas., N. S., 53; Weeks *v.* Boston Elev. Ry. Co. (Mass.), 24 R. R. R. 177, 47 Am. & Eng. R. Cas., N. S., 177 (conductor not required to hold car until woman had become seated, nor to notify her that he was about to start car); United Rys. & Elec. Ry. Co. *v.* Weir (Md.), 22 R. R. R. 472, 45 Am. & Eng. R. Cas., N. S., 472 (proper duration of stop to allow passenger to alight); Burke *v.* Bay City Traction, etc., Co. (Mich.), 22 R. R. R. 758, 45 Am. & Eng. R. Cas., N. S., 758 (negligence as to alighting passenger); Richmond Traction Co. *v.* Williams (Va.), 9 R. R. R. 754, 32 Am. & Eng. R. Cas., N. S., 754 (it is the

to a passenger while entering a car, an instruction that it was not necessary to keep the car stationary until she reached the inside of the car was properly refused, as tending to mislead, where there was testimony that the car was started improperly.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Personal injury action by Mrs. M. E. Hawkins against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Tillman, Grubb, Bradley & Morrow, for appellant.
Peyton H. Moore, for appellee.

SIMPSON, J. This was an action by the appellee against the appellant for damages on account of injuries received by appellee while a passenger on the electric car of appellant. The first count of the complaint, on which the issue was joined, alleges negligence generally, by reason of which the plaintiff "was violently thrown to the floor of said car, and was caused thereby to strike the floor of the rear platform of said car with her back very forcibly." The only testimony offered by the plaintiff was her own, to the effect that, when the car stopped, she, with her daughter-in-law and another lady, boarded the car; that when her

duty of a street railway to use extraordinary care and caution to see that passengers are not injured in getting on or off its cars when stopped at a regular point for stopping); Boone *v.* Oakland Transit Co. (Cal.), 9 R. R. R. 601, 32 Am. & Eng. R. Cas., N. S., 601 (duty of street railway to afford its passengers reasonable opportunity to alight is no greater than that of an ordinary steam railroad company); Betts *v.* Wilmington City Ry. Co. (Del.), 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602 (negligence causing injury to alighting passenger through sudden starting of car); O'Neil *v.* Lynn & B. R. Co. (Mass.), 2 R. R. R. 263, 25 Am. & Eng. R. Cas., N. S., 263 (sufficiency of evidence of negligence in starting car while passenger was alighting); United Rys. & Elec. Co. *v.* Beidelman (Md.), 4 R. R. R. 662, 27 Am. & Eng. R. Cas., N. S., 662 (negligence in starting car while passenger is alighting); Phillips *v.* St. Charles St. R. Co. (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902 (sufficiency of evidence of negligence in letting off passenger); Redington *v.* Harrisburg Traction Co. (Pa.), 16 R. R. R. 600, 39 Am. & Eng. R. Cas., N. S., 600 (duty of conductor on single track street railway to look on both sides of car before starting it, to see if passengers are about to enter); Little Rock, etc., Co. *v.* Kimbro (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501 (duty of motorman to see that no passenger is in the act of alighting or in a dangerous position before putting car again in motion); Behen *v.* St. Louis Transit Co. (Mo.), 18 R. R. R. 103, 41 Am. & Eng. R. Cas., N. S., 103 (duty not to start car until passenger has alighted, although he has had ample time to alight); Bennett *v.* Louisville Ry. Co. (Ky.), 19 R. R. R.730, 42 Am. & Eng. R. Cas., N. S., 730 (fact that passenger was large and fleshy did not render it negligence to fail to keep car stationary until he had seated himself); Raughley *v.* West Jersey &

daughter-in-law was inside the car "and the plaintiff was on the platform (of the car), just at the door, and in the act of stepping through it inside of the car, and the neighbor lady was still on the platform, nearer the step than plaintiff, the car was "started with an unusually hard and violent jerk, and threw plaintiff back against the controller of the car and down to the platform." The defendant's witness, who was the motorman, testified that he was not aware of the plaintiff's position "and that he started it [the car] with no unusual jerk." So it became important to instruct the jury as to the law applicable to each of the two aspects of the case.

The defendant requested the court to give the following charge, which was refused, to wit: "It was not the duty of defendant's servants, in control and charge of its car, to keep the car standing still until the plaintiff had reached the inside of the car." In the management of electric street cars it is the duty of the motorman, conductor, or party in control to hold the car stationary until those desiring to enter the car have gotten on the car and reached a place of safety. The cases agree that it is negligence to start the car while the passenger is in the act of stepping onto the car, and, on the other hand, they hold that there is no obligation to keep the car standing until the passenger has taken his seat. 6 Cyc. 616. As our own court has expressed it, the party in

S. R. Co. (Pa.), 2 R. R. R. 256, 25 Am. & Eng. R. Cas., N. S., 256 (negligence in causing sudden jar while passenger was alighting); Walters *v.* Chicago & N. W. Ry. Co. (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237 (negligence in giving signal to start); O'Neil *v.* Lynn & B. R. Co. (Mass.), 2 R. R. R. 263, 25 Am. & Eng. R. Cas., N. S., 263 (negligence in starting car while passenger was alighting was question for jury); Foster *v.* Seattle Electric Co. (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640 (negligence in starting car while passenger was boarding); Powelson *v.* United Traction Co. (Pa.), 6 R. R. R. 927, 29 Am. & Eng. R. Cas., N. S., 927 (negligence was question for jury where passenger was injured, while attempting to board summer car by a stepping on running board after he had waved his hand to conductor, by reason of sudden starting of car); Sharp *v.* New Orleans City Ry. Co. (La.), 11 R. R. R. 668, 34 Am. & Eng. R. Cas., N. S., 668 (not negligence for a street car to start while a passenger is in the act of passing from the platform into the car); Bennett *v.* Louisville Ry. Co. (Ky.), 19 R. R. R. 730, 42 Am. & Eng. R. Cas., N. S., 730 (not negligence to fail to keep car stationary until passenger has seated himself, unless it is reasonably apparent to those in charge of car that passenger needs unusual care); Herbich *v.* North Jersey St. Ry. Co. (N. J.), 5 R. R. R. 255, 28 Am. & Eng. R. Cas., N. S., 255 (peremptory instruction for defendant properly refused where child was thrown down by sudden starting of car before she had time to be seated); Sweet *v.* Birmingham Ry. & Elec. Co. (Ala.), 6 R. R. R. 784, 29 Am. & Eng. R. Cas., N. S., 784 (negligence was question for jury where alighting passenger was injured by reason of sudden jerk of car); Beringer *v.* Dubuque St. Ry. Co. (Iowa), 6 R. R. R. 872, 29 Am. & Eng. R. Cas., N. S., 872 (sufficiency of evidence of negligence where alighting passenger was injured by reason of premature start-

charge of the car must see that the passenger is not "alighting (or getting on) or otherwise in a position which would be rendered perilous by the motion of the car." Birmingham Union Ry. *v.* Smith, 90 Ala. 60, 8 South. 86, 24 Am. St. Rep. 761; H. A. & B. R. R. Co. *v.* Burt, 92 Ala. 291, 9 South. 410, 13 L. R. A. 95. The passenger must be allowed "a reasonable opportunity to get safely upon the car," and "if anything is apparent in the condition of the passenger, so that he would be likely to be thrown or injured by a motion of the car, the proper regard for his safety might require a train to be held in position to avoid it." Steeg *v.* St. Paul City Ry. Co., 50 Minn. 149, 52 N. W. 393, 394, 16 L. R. A. 379; Miller *v.* Same, 66 Minn. 192, 68 N. W. 862; Yarnell *v.* K. C., Ft. S., S. & M. R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599, 601, 602; 2 Hutchinson on Carriers (3d Ed.) p. 1299, § 1111; Bennett *v.* Louisville Ry. Co., 28 Ky. Law Rep. 998, 90 S. W. 1082, 4 L. R. A. (N. S.) 558. From these and other cases, it seems that under ordinary conditions, unless some special circumstances requiring greater caution is brought to the attention of the motorman or the conductor, the passenger is considered to have reached a place of safety when he or she has gotten on the car.

It is a matter of common knowledge that many persons do not sit down at all, but ride, standing on the platform and in the aisle of the car; there being railings on the platform and loops in the car for passengers to hold to while the car is in motion. Consequently, in this case, in which no special circumstances are shown, the passenger having boarded the car and being in the act of stepping from the platform into the door of the car, it could not, as a matter of law, be said to be negligence for the car to be started in the usual manner and without any unusual jerk. Sharp *v.* N. O. City Ry. Co., 111 La. 395, 35 South. 614, 100 Am. St. Rep. 488. But it would be otherwise if it was started in an unusual manner, with a severe jerk, while the passenger was entering the door. Therefore, while it is true that it is not

ing of car); Little Rock, etc., Co. *v.* Kimbro (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501 (duty to give passengers sufficient time to alight); Hatch *v.* Philadelphia & R. Ry. Co. (Pa.), 16 R. R. R. 586, 39 Am. & Eng. R. Cas., N. S., 586 (where passenger was thrown from step of car while trying to enter it, by sudden starting of car, carrier was liable for his injuries); Selby *v.* Detroit Ry. (Mich.), 16 R. R. R. 583, 39 Am. & Eng. R. Cas., N. S., 583 (where street car is stopped, under circumstances which justify the passenger in believing that he is invited to alight, conductor must not start car while he is alighting); Miller *v.* St. Paul, etc., Ry. Co. (Minn.), 5 Am. & Eng. R. Cas., N. S., 718 (negligence in starting car while passenger is boarding); Chicago City Ry. Co. *v.* Densmore (Ill.), 6 Am. & Eng. R. Cas., N. S., 794 (alighting passenger injured by reason of sudden jerk of car); Nichols *v.* Lynn & B. R. Co. (Mass.), 9 Am. & Eng. R. Cas., N. S., 844 (negligence with respect to alighting passenger); extensive note, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904.

the duty of the motorman or conductor to keep the car standing until the passenger reaches the inside of the car, provided it is started in a proper manner, yet, as in this case there was evidence tending to show that the car was started in an improper manner, charge 1 was calculated to mislead the jury, and the court cannot be placed in error for refusing to give it. Charge 2 was merely an answer to an argument, and was properly refused.

The judgment of the court is affirmed.

TYSON, C. J., and ANDERSON and DENSON, JJ., concur.

EFLAND *et al. v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 20, 1907.)

[59 S. E. Rep. 355.]

Railroads—Corporations—Legislative Regulation.—The right of the state to regulate public service corporations and other business enterprises in which the owners have devoted their property to public use is too firmly established to permit discussion.

Statutes—Construction—Particular Words and Phrases.—The word "company" may be construed to include all corporations, companies, firms, or individuals in statutes passed in promotion of the public good, such as the enforcement of the collection of revenue, regulation of the exercise of quasi public franchises, and in other similar matters.

Constitutional Law—Equal Protection of Law—Carriers—Overcharge—Penalty.*—Under Revisal 1905, c. 61, §§ 2642, 2643, 2644, providing that no transportation company shall charge more than the legal and published rate allowed by law, and that any overcharge shall be returned within 60 days after demand, and prescribing the penalty for failure to make such return, and in view of the sections of chapter 20, Revisal 1905, dealing with cognate subjects, and giving the corporation commissioners power to establish regulations as to companies engaged in domestic traffic, it is clear that the term "company" was intended to include all corporations, companies, firms, or individuals engaged as common carriers of freight, so that the law does not deny to corporate common carriers the equal protection of the law required by Const. U. S. Amend. 14, by arbitrarily imposing a penalty on corporations and not on individuals.

Same—Regulation of Franchises.*—Where the law establishing

*For the authorities in this series on the subject of the constitutionality of statutes prescribing penalties to compel carriers to perform their duties, etc., see foot-notes appended to Stone & Co. *v.* Atlantic Coast Line Ry. Co. (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

regulations and imposing penalties makes a classification on a reasonable basis, and having a real relation to the privileges or duties of the members of the class created, it is not imposing a penalty for the nonpayment of debts, thereby creating an arbitrary classification within the prohibition of Const. U. S. Amend. 14, forbidding the denial of the equal protection of the law.

Same—Carriers—Regulation—Violation—Penalties. — Revisal 1905, c. 61, §§ 2242, 2243, 2244, provide that no transportation company shall charge more for its services than the legal published rates, and for a penalty for not returning an overcharge within 60 days after formal demand upon the company. Held, that the penalty is not for the nonpayment of a debt, but for having made an extortionate charge and failing to return the same within a reasonable time after demand, and hence the statute does not deny such companies the equal protection of the law.

Appeal from Superior Court, Orange County; Council, Judge.

Action by John L. and M. P. Efland against the Southern Railway Company to recover an overcharge and the penalty for not returning the same within the time required by law. From a judgment for plaintiffs, defendant appeals. Affirmed.

The demand was for the amount of an overcharge paid by plaintiffs on a shipment from Efland, in North Carolina, to Lexington, N. C., and for a penalty for failure to adjust same imposed by section 2644, Revisal 1905. There was evidence on part of plaintiffs tending to establish the claim and formal demand therefor as required by the statute. The judge charged the jury as follows: "That if they should find from the evidence that the plaintiffs had paid an overcharge of $7.96 as alleged by plaintiffs, and that plaintiffs had filed claim, as alleged, on the 20th day of September, 1906, accompanied with paid freight receipt and bill of lading, with freight claim agent of the defendant company, and the same was not refunded within 60 days after the filing of said claim, then the plaintiffs would be entitled to recover $100 as penalty for such failure to settle the demand, it being admitted that more than 60 days had lapsed since the claim was filed." On the testimony and under the charge, the jury rendered the following verdict: "Is defendant indebted to plaintiff, and, if so, in what amount? Ans. Yes; (1) by way of overcharge, $7.96; (2) by way of penalty, $100." Defendant by exception, duly noted, objected to the validity of the judgment and appealed, assigning for error that the statute imposing the penalty is in violation of section 1 of the fourteenth amendment to the national Constitution and denies to the defendant the equal protection of the law.

F. H. Busbee & Son and *S. M. Gattis,* for appellant.
Frank Nash, for appellee.

HOKE, J. (after stating the facts as above). Our statute applicable to the questions involved in this appeal (Revisal 1905, c. 61, § 2642) directs: "That no railroad, steamboat, express or other transportation company engaged in the carriage of freight, and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages, more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law." In section 2643 a method is established by which formal demand for return of an overcharge shall be made, and allows a maximum period of 60 days within which to return the same; and section 2644, the section objected to, provides as follows: "Any company failing to return such overcharge, within the time allowed, shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the aggrieved: provided, the total forfeiture shall not exceed one hundred dollars." Under the charge of the court and the admissions therein referred to, the facts are necessarily established that there had been an overcharge for freight collected from plaintiffs by defendant, that demand for its return has been formally made, as required by the statute, and that there has been a failure to return the amount to plaintiffs for a period greater than the 60 days declared to be the maximum period allowed, and for a time more than sufficient to make the maximum penalty of $100. On the facts, therefore, the plaintiff's claim comes directly within the provisions of the statute, and, unless the law is invalid, the judgment in his favor must be unheld. This being a domestic or intrastate shipment, the commerce clause of the federal Constitution, and the various decisions construing it, do not affect the case, and the question presented, and which the defendant desired, and intended to present, is whether this legislation is in conflict with the provisions of the fourteenth amendment, guaranteeing to every citizen of the United States, equal protection of the law. The statute has been passed upon by direct adjudication of this court in Cottrell *v.* Railroad, 141 N. C. 383, 54 S. E. 288, and we might well refer to that decision as conclusive of the matter without more. It was, however, earnestly urged on the argument of the present appeal that the law in question is in violation of the section of the Constitution referred to. And as the constitutionality of the statute was accepted, without debate, in Cottrell's Case, *supra,* we have deemed it well that the positions contended for by defendant should be more fully considered.

The right of the state to establish regulations for these public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to

a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion. Harrill's Case, 144 N. C. 532, 57 S. E. 383; Stone's Case, 144 N. C. 220, 56 S. E. 932; Walker's Case, 137 N. C. 168, 49 S. E. 84; McGowan's Case, 95 N. C. 417; Branch's Case, 77 N. C. 347; Railway *v.* State of Florida, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175; Railway *v.* Humes, 115 U. S. 513, 6 Sup. Ct. 110, 29 L. Ed. 463; Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238; Munn *v.* Ill., 94 U. S. 113, 24 L. Ed. 77. As said by Associate Justice Fields in Humes' Case, *supra*: "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages." And the right to establish such regulations for certain classes of pursuits and occupations imposing these requirements equally on all members of a given class has been made to rest very largely in the discretion of the Legislature. Tullis *v.* Railway, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Insurance Co. *v.* Daggs, 172 U. S. 562, 19 Sup. Ct. 281, 43 L. Ed. 552; Magoun *v.* Savings Bank; 170 U. S. 286, 18 Sup. Ct. 594, 42 L. Ed. 1037. In Tullis' Case, just referred to, Chief Justice Fuller, quoting with approval from the decision in Dagg's Case, *supra*, said: "The power of the state to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion that it was sufficient to satisfy the demands of the Constitution, if the classifications were practical and not palpably arbitrary." There are limitations on the right of a State Legislature to impose these regulations, as indicated in Smyth *v.* Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and other cases of a like import, the exact nature and extent of which are not as yet fully or clearly defined. As said by Mr. Freunde in his work on the Police Power, § 550: "It has been shown that after some hesitation the courts have asserted and now fully exercise the power to control the legislative determination that a rate is reasonable.

It has therefore become incumbent upon the courts to lay down the principles by which the question of reasonableness must be judged, and the federal Supreme Court alone can conclusively establish these principles in an affirmative manner. However, this important problem has not yet been finally solved." From the very nature of the case it would be difficult, perhaps impossible, to lay down a general rule so plain and precise that different cases could be readily referred to the one side or the other; and the United States Supreme Court has very wisely determined that the line shall be marked and the doctrine explained and applied by their decisions on the varying cases as they may arise.

This phase of the matter is not pursued further for the reason that the defendant does not assail the law, because the regulations thereby imposed are unreasonable in themselves, but because it establishes an unreasonable and arbitrary classification: (1) In imposing the regulation therein specified on corporations and companies engaged in the transportation of freight, while individuals engaged in like service are not included. (2) Because a penalty is imposed on corporations and companies mentioned for not paying their debts, and in this denying such companies the equal protection of the law; on the principle established more especially by the decision of the Supreme Court of the United States in Railway *v.* Ellis, 165 U. S. 151, 17 Sup. Ct. 255, 41 L. Ed. 666. In Ellis' Case it is held: "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." And, while this court gives full adherence to the principle there stated, we are of opinion that its proper application does not sustain the defendant in either position maintained by them.

As to the first, "That it denies to defendant equal protection of the law, in that individuals engaged in like occupation are not included in the term of the statute," even if the construction assumed as the basis of this position should be the true one, we are inclined to the opinion that the classification could be upheld, applying as it does to all corporations and companies engaged in the transportation of freight as common carriers. The terms are, we think, sufficiently broad and the regulations thereunder have such a reasonable relation to the occupation in which the companies are engaged that the Legislature in the proper exercise of its police power might well have determined that such a classification could be upheld on the principle established by the cases heretofore cited, and that, even if individuals were shown to have engaged in like occupations, their enterprises would necessarily

be so restricted and of such little moment that their cases would not require that they should be embraced by the statute. But we are of opinion that the construction of the law assumed by the defendant is not the correct one. A perusal of the entire statute and its different sections, taken in connection with those sections of chapter 20 of the Revisal of 1905, which deal with cognate subjects and whereby the corporation commissions are given power to establish these regulations in reference to companies engaged in domestic traffic, lead us to the conclusion that the Legislature applied, and intended to apply, these provisions of the law to all corporations and companies engaged in the transportation of freight for the public; that it was the occupation which it had chiefly in mind, rather than the agency engaged; and that the term "company" was used and intended to include all corporations, companies, firms, or individuals who were engaged as common carriers in the transportation of freight. Many of the sections of the statute could be referred to in support of this construction, and this interpretation has been frequently applied to the word "company" in statutes passed in promotion of the public weal, in enforcement of the collection of revenue, in regulating the proper exercise of quasi public franchises and in other regulations of like character. This significance was given to the term "company" in the case of Sewing-Machine Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497, where an occupation tax was collected from an individual engaged in a pursuit where only "companies" were taxed, and Lumpkin, judge of the court, said: "The most serious question for determination as to the constitutionality of the law in hand, in view of the 'uniformity clause' above mentioned, is this: Is its language sufficiently comprehensive in meaning to embrace all manufactures of sewing machines who sell at retail? Unless it is, the law must fail; because, when once a class is established, every member properly belonging to that class must be taxed, or else the uniformity required is destroyed. If the words 'every sewing machine company' are applicable only to corporations or partnerships, then individuals manufacturing and selling sewing machines would not be reached. It may be true, in point of fact, that there are no single individuals in Georgia answering to this description; but the law should be broad enough in its terms to include any person who may at any time, upon his own account, enter upon such business, for otherwise it would be possible for an individual to begin the transaction of this very business, and escape tax which corporations in the same business are compelled to pay. An omission of this kind in a taxing law might, in some instances, operate as an invitation to individuals to undertake business enterprises, because of an attendant nonliability for taxes, and a consequent advantage to be gained over competitors engaged in the same business who are specifically named and

taxed. At any rate, such an omission makes a discrimination which the Constitution forbids. We think, however, that, so far as the law with which we are now leading is concerned, the whole difficulty may be properly removed by simply holding that the words 'every sewing machine company' would apply to every sewing machine 'man' who undertook to engage in the manufacture and sale of such machines in this state. This construction, upon reflection, will be found not to be a strained or unreasonable one. On the contrary, we think it is entirely permissible, when reference is had to the object of the law in question; that object being, not to tax a company or person carrying on the business, but the business itself. Of course, if the tax be upon the business, it is entirely immaterial whether such business be carried on by an individual, a partnership, or a corporation. As has been seen, the power of the Legislature extends only to classifying business occupations into different branches, and laying upon each separate branch thus created such a tax as is deemed proper. The Legislature has absolutely no power to classify persons, natural or artifical, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformally upon all. Therefore it would certainly seem the most natural and reasonable inference that the General Assembly, in passing the law in question, attempted to accomplish what it had an undoubted right to do, rather than that which the Constitution expressly forbids. It should be the purpose of the courts to give effect to legislative intention, and, where the intention is not perfectly clear, the unbending rule is that such a reasonable construction of the statute as will render it harmonious with the constitutional restrictions should invariably be adopted. In the present instance we are quite sure the Legislature intended that this tax should apply to the business in question, no matter by whom the same might be conducted." And decisions of like import have been made elsewhere by courts of the highest authority. Mo. *v.* Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388, Dock & Canal Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448; Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547; Manufacturing Co. *v.* Wright (C. C.) 33 Fed. 121. The statute in question does not make the discrimination complained of by defendant, and its first position, therefore, finds no support in the law as correctly construed.

And we hold that the second ground of defendant's objection to the statute is not well considered, being of opinion that it does not come within the principle of the decision relied on to support it. Ellis' Case, *supra*. That decision involved the validity of a statute of the state of Texas, which imposed a fee of $10 on claims against railroad companies, not exceeding $50, for personal service rendered or labor done, a damage for overcharge on

freight, etc., which the company failed to pay for 30 days after demand was duly made, and which claimant was compelled to collect by action, etc. The statute was held unconstitutional, and a recovery by plaintiff denied. This, as we understand the opinion, was on the ground that the statute embraced claims for personal services rendered or labor done, as well as for damages for all overcharges of freight, etc., and, the Supreme Court of Texas having held the statute constitutional as a whole, the United States Supreme Court, accepting that construction of the statute, considered it as one imposing a penalty for the nonpayment of debts, and, as such, having no reasonable reference especially to a railroad, as distinguished from any other corporation, or the proper exercise of its franchise or the performance of its duties or the dangers incident to its operation, and held that such a classification was therefore arbitrary and colorable, and the penalty imposed pursuant to same was contrary to law. But the principle does not obtain where the law which establishes the regulations and imposes the penalties makes a classification resting on some reasonable ground, and having some real relation, to the privileges enjoyed or duties especially incumbent on all members of the class which it creates. Accordingly in several opinions determined since the Ellis Case, notably in the case of Railway *v.* Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, and Railway *v.* Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, the same high court, the final arbiter in such questions, has upheld classifications for the reason indicated, and these opinions are, to our mind, controlling in the case we are considering, and decide the questions raised against defendant's position. In Matthew's Case, *supra,* a statute of the state of Kansas allowed an attorney's fee in case of recovery against railroad companies for damages caused by fires in the operation of the company's trains. The statute was upheld because the court was of the opinion that the classification established was not arbitrary as in Ellis' Case, but was made in reference to the damages from fires, peculiarly incident to the operation of trains. Mr. Justice Brewer, for the court, said: "Its monition to the roads is not: 'Pay your debts without suit, or you will have to pay for attorney's fee.' But rather: 'See to it that no fire escapes from your locomotives, for, if it does, you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fee of the owner of the property injured or destroyed.'" And so it is here. The penalty imposed is, not for the nonpayment of a debt, in the ordinary acceptation of that term, but it is for having made a extortionate charge, and failing to return the same within a reasonable time after demand was formally made, pursuant to law.

The regulation established in section 2642, applying, as we have seen, to all corporations and companies, including firms and individuals, engaged as common carriers in the transportation

of freight, is one that the Legislature had the undoubted right to make. Its proper application and efficient enforcement is of supreme importance to shippers and the public. The Legislature could, no doubt, have imposed a penalty for making an extortionate charge, and its power of a certainty is not impaired or destroyed because in reasonable consideration of the carrier's interest it is allowed time to investigate the demand and inform itself of the facts. The penalty is imposed, as stated, not for the nonpayment of a debt, but for wrongfully withholding an amount charged contrary to law, and is in direct enforcement of the carrier's duties.

Since this opinion was prepared, our attention has been called to an opinion just delivered by the United States Supreme Court in the case of Seabord Air Line Railway *v.* Seigers Bros., 28 Sup. Ct. —, 52 L. Ed. —, in which a statute of the state of South Carolina, similar to the one we are considering, was declared to be constitutional and valid. This opinion of the United States Court is decisive of the principal questions involved in this appeal, and the full and learned opinion of the South Carolina Supreme Court, reported in 73 S. C. 71, 52 S. E. 797, also gives convincing reason in support of the position. There is no error in the defendant's appeal, and the judgment of the court below is affirmed.

No error.

CONNELL *v.* SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington, Nov. 8, 1907.)

[92 Pac. Rep. 377.]

Carriers—Injury to Passengers—Care by Motormen—Instructions.* —An instruction, in an action against a carrier for injury to a passenger, which, after asserting that, if defendant's motormen exercised the highest degree of care to avoid the accident which was reasonably practicable under the circumstances, this was enough, states that by the term "highest degree of care" is meant that degree of care which would be exercised under like circumstances by very careful, prudent, and experienced conductors and motormen generally, does not require too much by the use of the word "very."

*For the authorities in this series on the subject of the degree of care required of street railways as carriers of passengers, see footnotes appended to Pitcher *v.* Old Colony St. Ry. Co. (Mass.), 24 R. R. R. 625, 47 Am. & Eng. R. Cas., N. S., 625; Egan *v.* Old Colony St. Ry. Co. (Mass.), 23 R. R. R. 406, 46 Am. & Eng. R. Cas., N. S., 406.

Connell *v.* Seattle, etc., Ry. Co

Same—Collision of Cars—Presumption of Negligence—Instructions.†—Where the complaint, in an action against an electric railway company for injury to a passenger by collision of two cars, simply charges in general terms that defendant, and its agents and servants, so carelessly and negligently operated the cars that they come together in a head-on collision, and that by the exercise of proper care the collision could have been avoided, and the fact of collision was admitted, and defendant introduced evidence bearing on the acts and limitations of the two motormen under the circumstances, it was not error to place on defendant the imputation of negligence, based on its admission of a collision, by an instruction that if the jury found the motorman in either car failed to exercise the judgment, care, caution, and skill necessary under the circumstances, and failed to exercise the care, judgment, caution, and skill usually and customarily attendant in like conditions and circumstances, then defendant had failed to overcome the imputation of negligence in operating the cars, arising in case of such collision.

New Trial—Misconduct of Plaintiff at Trial.—Plaintiff, in a personal injury case, cannot be said to have been guilty of misconduct because, near the close of the argument for defendant, she burst out crying and trembling, and was suddenly taken out of the room, in view of the jury, by those who were with her; she having been engaged in a long trial, the evidence tending to show she was very nervous as the result of her injuries, the argument having been in progress for an hour, and it not being an unreasonable inference, based on the evidence, that the argument may have involved criticism of her to such an extent that, as a nervous woman, she was unavoidably overcome in such manner.

Damages—Excessive Damages—Personal Injuries.—A verdict of $3,500 cannot be said to be excessive, where plaintiff, who for years had worked and earned her living, and at the time of her injury was employed in a store in the alteration of ladies' tailor-made gowns, was so bruised about her side and injured about her ribs and spine that she has since been unable to follow any vocation.

Appeal from Superior Court, King County; R. S. Steiner, Judge.

Action by Mary J. Connell against the Seattle, Renton & Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Sachs & Hale, for appellant.
Geo. P. Rossman and *Jackson Silbaugh,* for respondent.

HADLEY, C. J. This is an action to recover damages for per-

†For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see foot-notes appended to Enos *v.* Rhode Island Sub. Ry. Co. (R. I.), 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612.

sonal injuries received by the plaintiff in collision on the defendant's railroad. The defendant owns and operates an electric railway between the city of Seattle and the town of Renton. The plaintiff was a passenger upon one of the defendant's cars, when it was met upon the same track by what was known as the "line car." This was a box-like car, used for carrying freight, and was not employed for passenger service. The passenger car, upon which the plaintiff was riding, was moving over the track, the grade of which was practically level. Two or three blocks in front of this car the track began a steep ascent, upon a grade of at least 11 per cent. and perhaps more. The line car was coming down this grade, when for some reason its operator failed to control it. The wheels slid, and the brakes failed to hold it or to check its speed. The car moved down the hill at a high rate of speed, checked somewhat after reaching the level, and plunged head-on into the passenger car, causing the plaintiff's injuries. The defendant denied negligence on its part, and, after a trial before a jury, a verdict was returned for plaintiff in the sum of $3,500, for which amount judgment was entered. The defendant has appealed.

It is assigned that the court erred in refusing to give the following instruction: "With respect to the degree of care owed by the defendant to its passengers, you are instructed that the duty enjoined by the law upon defendant's conductors and motormen does not require the exercise of the highest degree of care possible to avoid an accident, but only the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question. By the term 'highest degree of care,' used in these instructions, is meant that degree of care which would be exercised under like circumstances by careful, prudent, and experienced conductors and motorman generally." The substance of the above instruction was given in the following modified form: "But the defendant is not an insurer of the safety of its passengers in any and at all events. If its motormen exercised the highest degree of care to avoid the accident which is reasonably practicable under the circumstances and conditions existing at the time and place in question, the demands of the law are satisfied. By the term 'highest degree of care,' used in these instructions, is meant that degree of care which would be exercised under like circumstances by very careful, prudent, and experienced conductors and motormen generally." We think all essential points covered by the instruction as requested were effectively covered in the instruction as given in the modified form. The instruction as given is criticised because the court characterized the term "highest degree of care" as that which would be exercised under like circumstances by "very careful, prudent, and experienced conductors and motormen generally." The objection is to the use of the word "very"

in the above connection. We see no error in the respect mentioned. The court's instruction as to the highest degree of care that should be exercised under given circumstances was in accord with the decision of this court in Foster *v.* Seattle Electric Company, 35 Wash. 177, 76 Pac. 995. It seems almost axiomatic that only very careful, prudent, and experienced operators of cars can exercise the highest degree of care.

It is assigned that it was error to give the following instruction: "If you should find that the motorman of either car failed to exercise the judgment, care, caution, and skill which was necessary under all the existing circumstances, and that they, or either of them, failed to exercise the care, judgment, caution, and skill usually and customarily attendant in like conditions and circumstances, then the defendant has failed to overcome the imputation of negligence in operating said cars arising in case of such collision, and you should find for the plaintiff, and give her such damages as you find she has sustained, if all the other elements of her cause of action have been proved to your satisfaction." It is argued that the instruction without limitation erroneously placed upon appellant the imputation of negligence based upon the admission by appellant that a collision did in fact occur. It is conceded to be the rule, where two cars of the same railway company collide, that a presumption of negligence arises against the company, which it must overcome in order to escape liability for injuries received in such collision. It is, however, further contended that, if a plaintiff avers more than general negligence and relies upon some particular acts of negligence, the rule is different, and that by the allegation of such particular negligence a plaintiff is limited in his proofs to that subject, and assumes the burden of proving that the defendant is guilty of the particular negligence alleged. Without passing upon the merits of appellant's argument in the above respect, when applied to certain pleadings and issues, it is sufficient to say that we do not see its relevancy to the issue tendered by the complaint in this case. The complaint simply charges that the appellant, and its agents and servants, so carelessly and negligently operated the cars that they came together in a head-on collision, and that by the exercise of proper care the collision could have been avoided. The allegations as to negligence are in very general terms. The fact of the collision was admitted, and, under the pleadings, the imputation of negligence then arose against appellant. There was evidence introduced by appellant bearing upon the acts and limitations of the two motormen under the circumstances, and we think it was not error for the court to instruct the jury that, if they found such acts were not consistent with the care required by law, then the appellant had failed to overcome the imputation of negligence. We find no prejudicial error in the instructions given, or in the refusal to instruct in the form requested.

It is contended that it was error to deny appellant's motion to set aside the verdict and to grant a new trial. One ground urged is misconduct of respondent at the trial of the case. The following record was made at the trial:

"During the argument of Mr. Sachs to the jury on behalf of the defendant, the following proceedings occurred, to wit:

"Mr. Sachs: If the court please, I ask that the record show the facts of what happened at this time.

"The Court: Oh, it is a matter the court has no control over at this time. Do you raise any objection?

"Mr. Sachs: Yes, your honor.

"The Court: Make your statement.

"Mr. Sachs: I ask the record to show that during the argument of counsel for defendant, and at the time he is about to close, that the plaintiff in this action burst out into a crying spell, trembling and so forth, and was taken suddenly out of the court, in view of the jury, by those who were with her at the time.

"The Court: Let the record show at what time this occurred, Mr. Sachs.

"Mr. Sachs: I say during the argument for the defendant and at the time of the closing.

"The Court: Yes; after how long engaged in addressing the jury?

"Mr. Sachs: I think about half an hour.

"The Court: I think it is over an hour, Mr. Sachs.

"Mr. Sachs: Is it over an hour? Whatever time it was. I don't remember."

It certainly cannot be said from the above record that respondent was intentionally guilty of any misconduct. She had been engaged in a long trial, and the evidence tends to show that she was very nervous as the result of her injuries. The remark made by the court indicates that appellant's counsel had been making an extended argument to the jury in the case, and it is not unreasonable to infer, based upon the evidence, that such an argument may have involved criticism of her to such an extent that, as a nervous woman, she was unavoidably overcome in the manner indicated. We shall not say the facts appearing in the record show misconduct.

It is further urged that a new trial should have been granted on the ground of excessive damages returned by the jury. We have carefully read the evidence, and we find testimony to the following effect: Respondent was standing and holding to a strap in a car crowded full of passengers. The force of the collision threw her violently in the mass of passengers, and she was much bruised about her side and injured about her ribs and spine. She was shown to be very nervous since the accident, although she was reasonably strong and well before. For years she had worked and earned her own living expenses. At the time of the

injuries she was employed in the store of Stone, Fisher & Lane, in Seattle, in the alteration of ladies tailor-made gowns; but since the accident she has been unable to follow that vocation, or any other. Under such evidence we shall not say that the verdict was excessive.

The judgment is affirmed.

RUDKIN, FULLERTON, DUNBAR, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

CHAFFE v. CONSOLIDATED RY. CO. INGRAHAM v. STATE.

(Supreme Judicial Court of Massachusetts, Worcester, Nov. 26, 1907.)

[82 N. E. Rep. 407.]

Carriers—Injury to Passenger—Relation of Carrier and Passenger—Evidence.—In a personal injury suit by a passenger against a street railway company, the evidence showed that defendant received and undertook to carry plaintiff and others in a car which it owned over a line of street railway. Held, in the absence of any contrary showing, that the inference that defendant was operating the car for the benefit of those who wished to avail themselves thereof was warranted.

Same—Carrier of Passengers—Degree of Care Required.*—A carrier must exercise such reasonable diligence for the safety of a passenger as the nature of the business allows.

Same—Negligence—Evidence—Collision with Street Car.†—The mere fact of a collision between street cars, until explained by the company, is evidence of its negligence.

Same—Questions for Jury.—In an action against a street railway company by a passenger injured in a collision, whether the company was negligent in managing the other colliding car held for the jury.

Same—Liability of Company.‡—A street railway company is liable for an injury to a passenger, caused by negligent management of a work car, resulting in a collision with the car in which the passenger was riding, even if the work car and the railway were under the control of another company.

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

*See first foot-note appended to preceding case.

†See second foot-note appended to preceding case.

‡See generally, foot-notes appended to Louisville Ry. Co. *v.* Blum (Ky.), 20 R. R. R. 44, 43 Am. & Eng. R. Cas., N. S., 44.

Chaffe *v.* Consolidated Ry. Co

Consolidated actions by Belle Chaffe and Henry M. Ingraham against the Consolidated Railway Company. Judgment for plaintiffs and defendant excepts. Exceptions overruled.

John Alden Thayer and *Charles B. Perry,* for plaintiffs.
Choate, Hall & Stewart, for defendant.

BRADLEY, J. Unless there was evidence that the relation of passenger and carrier existed between the parties, the defendant's request that a verdict be ordered in its favor should have been granted. At the outset, the bill of exceptions states, that at the time of the accident the plaintiffs "were passengers upon a car of the defendant." The subsequent recital of an admission of ownership merely emphasizes this statement. It is urged by the defendant, that notwithstanding this admission there was no evidence as to who was operating the car, or in control of the railway. But if the details are meager, it was beyond conjecture that the defendant, described in the writ as a railway company, owned a car running over a line of street railway, operated by electricity, in which the plaintiffs in common with others were being transported. It received and undertook to carry the plaintiffs in this car over the line of track on which it ran, and the use to which the car was put, with the conditions of operation unexplained, warranted the inference, that the defendant at the time offered this means of transportation to those who wished to avail themselves of such facilities. Indiana Union Traction Co. *v.* Jacobs (Ind.) 78 N. E. 325, 327. If the plaintiffs were passengers, in a car provided by the defendant, it had engaged to exercise such reasonable diligence for their safety during transportation as the nature of the business required. Gordon *v.* Wet End Street Railway Co., 175 Mass, 181, 55 N. E. 990; Davey *v.* Greenfield & Turners Falls Street Railway Co., 177 Mass. 106, 58 N. E. 172; Pomeroy *v.* Boston & Northern Street Railway Co., 193 Mass. 507, 79 N. E. 764; Egan *v.* Old Colony Street Railway Co. (Mass), 80 N. E. 696, and cases cited. Another car variously described as a work or flat car preceded the car in which the plaintiffs were riding, when as it approached a portion of the track in which there was a rising grade, the forward car being then a short distance in advance, slid on the rails, and suddenly descending came into collision with the passenger car, causing the accident. It is again said that there is a failure or evidence to connect the defendant with the management of the work car. But the plaintiffs having shown the collision, this fact until explained by the company was some evidence of negligence, as the jury could find that in the ordinary course of affairs it would not have happened if proper precautions had been taken. Egan *v.* Old Colony Street Railway Co., *ubi supra.* The defendant, indeed, offered some evidence of the efforts made by those in charge of the work

car, and the section men, as it passed, to prevent it from sliding, but the fact that neither the application of the brake, nor of the sand and gravel placed on the track appreciably retarded its speed, still left the question of negligence in the management of this car; to be determined by the jury. If negligence were found, then the defendant was responsible to the plaintiffs for the resulting injury to which it voluntarily had exposed them, even if the work car, and the railway were under the control of another corporation. Littlejohn *v.* Fitchburg Railroad Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; Stetler *v.* Chicago & Northwestern Railway Co., 46 Wis. 497, 1 N. W. 112. See, also, Engel *v.* New York, Providence & Boston Railroad Co., 160 Mass. 260, 263, 35 N. E. 547, 22 L. R. A. 282.

Exceptions overruled.

SAVANNAH ELECTRIC CO. *v.* WHEELER et al.

(Supreme Court of Georgia, July 9, 1907.)

[58 S. E. Rep. 38.]

Corporations—Liability for Torts of Agent.*—A street railway company is liable for a tort committed by its conductor in the prosecution and within the scope of its business, whether by negligence or willfully.

Same.—Where a petition alleged that a conductor on the car of a street railway company, while engaged in the prosecution and within the scope of his buisness in collecting fares, failed and refused to give a passenger correct change, and, upon request therefor, drew a pistol and fired at the passenger, but that the ball missed the passenger and struck a woman passing on the public street through which the car was running, causing her death, and that the plaintiffs were the husband and children of the decedent, the allegations set out a cause of action against the company, and the petition was not demurrable.

Master and Servant—Injuries to Third Persons—Liability of Master.—Allegations that the company knowingly placed in charge of one of its passenger cars a conductor of bad character, who was drunk and armed with a pistol, and that a homicide occurred in the manner indicated in the preceding note, were not demurrable.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

*See foot-notes appended to Rivers *v.* Yazoo & M. V. R. Co. (Miss.), 23 R. R. R. 363, 46 Am. & Eng. R. Cas., N. S., 363.

Savannah Electric Co. *v.* Wheeler

Action by Ferry F. Wheeler and another against the Savannah Electric Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Ferry F. Wheeler and Ferry F. Wheeler, Jr., a minor, appearing by his father as next friend, brought suit against the Savannah Electric Company. The petition contained three counts. The first alleged, in brief, as follows: The defendant, a corporation, operates, maintains, and controls a system of electric street railways, running in and through the streets of the city of Savannah, including a line of railway running through Broughton street, in the city of Savannah, and did so on October 26, 1905. It was a common carrier of passengers over said line. On the afternoon of that day one of its passenger cars was run and operated by two of its servants and agents; one of them being the motorman and the other the conductor. The conductor was the principal servant in charge of the car. He was drunk to such an extent that he was unable to properly perform his duties as conductor while collecting fares from the passengers. He was so unsteady upon his feet that he reeled from side to side of the car, and failed to make proper change for the passengers, in one instance giving pistol bullets for change. He failed and refused to give one of the passengers on the car the change that was due him, and, upon request to do so, with an oath, he drew his pistol from his pocket and tried to shoot the passenger. The latter grabbed the pistol barrel, and scuffled with the conductor in order to keep from being shot. During the scuffle the conductor fired the pistol three times at the passenger. One shot struck the passenger; the other two missing him. One of them passed through the window of the car, and struck Mrs. Wheeler, causing her death in a few minutes. At the time the bullet wound was received by her she was returning to her home on Broughton street, and was in the act of going up the steps of her house. At that time and place Broughton street was full of people passing and repassing, and any pistol shot fired in the car, as was done by the conductor, was very apt to do injury or cause death to some person upon the street. The shot was not actually intended for Mrs. Wheeler, and was not fired at her. It was intended to injure the passenger on the car or to kill him, and it would have done so had he not grabbed the pistol in time to change the course of the shot. The passenger had paid his fare, and had given no provocation whatever for the assault made upon him. There was no quarrel between him and the conductor and no enmity existed between them; but the assault upon him by the conductor was due to the drunken condition of the latter. The conductor was in a drunken condition at the time he took charge of the car as conductor, and had so been for some time prior thereto. On account of his condition he was totally unfit to be put in charge of the car, and the corporation knew of his unfitness to run the car

on that day prior to the time of the shooting, and in time to have prevented him from taking charge of the car and continuing to act as conductor thereof. Yet the company negligently permitted him to act for it as conductor of the car from the time it put him in charge up to and including the time of the death of Mrs. Wheeler. One of the plaintiffs was her husband and the other was her only child. The homicide resulted from the negligence of the defendant in permitting the drunken conductor, who was also armed, to its knowledge, to act, as conductor of said car, and from the negligence of the defendant, through its conductor, in violating the duty it owed to the passenger. The direct cause of the death of Mrs. Wheeler was the bullet fired by the conductor, and this was a tort, an act of negligence attributable to the defendant. The pistol was also fired at a place where the car was being operated and run in a public street of the city, and such firing at that place was a violation of the municipal laws of the city which prohibited the discharge of firearms within the limits of the city. Broughton street is about 80 feet wide, and the street car track runs down the middle of it. The distance between the conductor and Mrs. Wheeler at the time the pistol shot was fired was about 45 feet. There were also allegations as to the value of her life and her capacity to earn money. The second count differed from the first mainly in alleging that the defendant negligently permitted the drunken conductor to act for it as conductor from the time it put him in charge of the car on the day of the homicide up to and including the time of the injury, knowing his condition and that he was armed, and that the homicide resulted from such negligence. It is also alleged that the defendant was negligent in failing to exercise ordinary care and diligence in the employment of the conductor to act for it; that he was an unfit and improper person for such employment by reason of being habitually addicted to alcoholic liquors when on duty and being, while under such influence, a dangerous character who was apt to use his pistol, which he always carried when on duty, to the knowledge of the defendant; and that he had borne a bad record for a long time previous to his employment by the defendant on account of his drinking habits. Several instances of his previous conduct were stated. It was further alleged that on the evening in question he was drinking heavily at a resort at the terminus of the company's line, and was in a drunken condition on the car within the knowledge of the conductor and motorman who then had charge of it; that he had been previously assigned to duty by the defendant to relieve said conductor and take charge of the car when it should arrive at the shed in the city of Savannah and start on a tour through the streets for the purpose of carrying passengers; that it was the rule and custom of the defendant to inspect at said "car shed" the conductors and motormen who were assigned to

duty as a relief crew to take the place of other motormen and conductors who had to be relieved. At that place conductors were "checked up" and their accounts handed in just prior to being temporarily relieved from duty. The place of inspection is where the cars pass about half a mile from the station and headquarters. At that place the motorman and conductor who had brought in the car from the terminus turned it over to their successors, one of whom was the conductor who caused the injury. He was visibly so much under the influence of liquor that he was totally unfit to act as conductor. The company was laso negligent in allowing him to take charge of the car at that time and place. It was also negligent in failing to have any inspection of him as to his fitness to run the car, and in failing to remove him from his position as conductor prior to the time of the injury. The third count briefly alleged that the car was being operated by two of the agents of the company, one of them being the conductor, who was the principal agent; that on the car was a passenger who had duly paid his fare; that without any provocation the conductor assaulted him with a pistol; and that while shooting at the passenger the conductor accidently and negligently shot and killed Mrs. Wheeler, who was going up the steps of her home on Broughton street. The defendant filed a general demurrer, which was overruled, and it excepted.

Osborne & Lawrence, for plaintiff in error.
R. R. Richards and *R. G. Richards,* for defendants in error.

LUMPKIN, J. (after stating the foregoing facts). The demurrer to the plaintiff's petition was overruled. It raised several questions.

1, 2. Was the act of its conductor in shooting at the passenger attributable to the company, or was this the individual act of the conductor, for which the company was not responsible? "Every person shall be liable for torts committed by his * * * servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." Civ. Code 1895, § 3817. "Every corporation acts through its officers, and is responsible for the acts of such officers in the sphere of their appropriate duties." Civ. Code 1895, § 1861. What was the master's business? Operating electric street cars as a common carrier of passengers. In its conduct of that business it was bound to use extraordinary diligence to protect the lives and persons of its passengers. Civ. Code 1895, § 2266. Who was discharging this duty for the master? The petition alleges the conductor was so engaged. He was taking up fares, not for himself, but for the company. In doing this he had to make change. He failed and refused to give proper change to a passenger, and, when it was asked for, assaulted the passenger with a pistol. The protection of the passenger, the collecting of

fare, the giving of change, and dealing with passengers about these matters were all in the prosecution and within the scope of his employment. But it is said that when he conducted this dealing, not properly by giving change, but improperly by shooting at the passenger, that was his individual tort, and the company was not liable. Many authorities state the liability of a master for the tort of his servant substantially as it is codified in our Code. Expressions used in some reports and text-books, that a master is bound by the acts of his agent or servant in the scope of his agency and in furtherance of the master's business, or when the servant is acting for the benefit of the master, do not mean that the agent's act must be beneficial to the master or the latter is not bound. If any declare such a rule as that the master is bound by torts of the servant which benefit him, but not by any others, we cannot accept it as the rule in this state. In this matter, as in some others, there has been an evolution in the law, arising from the growth and change in corporate life and activity, and the better study of them. In Central Ry. Co. *v.* Brown, 113 Ga. 415, 38 S. E. 989, 84 Am. St. Rep. 250, it was held that: "A master is liable for the willful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them. This rule applies as well where the master is a corporation as where he is a private individual. A railroad company is liable as a trespasser to a passenger for an unjustifiable assault made upon him by the conductor of the train; the conductor being engaged in the company's business and in the conduct thereof making such assault." And again: "Some of the courts seem at one time to have been inclined to hold that a master could not be held liable for the willful torts of his servant, because, it was said, if the servant through anger or malice committed an assault upon a person, he ceased for the time being to occupy the position of servant, and acted independently; that, inasmuch as he was not authorized to commit an assault, he did not represent the master in that act, but acted as an individual, the master therefore being not liable either in case or in trespass. This argument has long since been exploded. The theory that one may be a servant one minute, and the very next minute get angry, commit an assault, and in that act be not a servant, was too refined a distinction." In Western & Atlantic Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842, it was held that, when a conductor maliciously assaulted one who was treating with him for passage, he was acting in the prosecution and scope of the company's business, and it was liable. And see Turner *v.* Atlantic Railroad, 69 Ga. 827. In Peeples *v.* Brunswick & Albany R. Co., 60 Ga. 282, where a declaration alleged that a conductor called a passenger out of the train of which he had charge and beat him, it was held to set out a cause of action, and was not subject to a general demurrer. In Craker *v.* Chicago

& Northwestern Ry. Co., 36 Wis. 657, 17 Am. Rep. 510, it was said: "If one hire out his dog to guard sheep against wolves, and the dog sleeps while the wolf makes away with a sheep, the owner is liable; but, if, the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum.*" In Gasway *v.* Atlanta & West Point R. Co., 58 Ga. 216, a railroad company was held liable for a willful tort of a baggage master and conductor committed upon one who was seeking to have his baggage checked. The trial judge charged to the effect that, unless the act of the defendant's agent tended to facilitate or promote the business for which the agent was employed, the company was not responsible, and refused to charge to the effect that the principal is responsible for the acts of its agents within the range of their employment. This court said: "Railroad companies are responsible to passengers for the torts of the conductors and other servants of the company employed in running trains when such torts are committed in connection with the business intrusted to such servants and spring from or grow immediately out of such business." This case has been often cited, but never reversed. In Haehl *v.* Wabash Ry. Co., 119 Mo. 325, 24 S. W. 737, where a bridge watchman willfully struck and shot a trespasser on the bridge, it was held to be an act in the scope of his employment, and that the company was liable. In Ramsden *v.* Boston & Albany R. Co., 104 Mass. 117, 6 Am. Rep. 200, it was held that a railroad corporation was responsible for an assault and battery by its conductor upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. In the opinion, Gray, J., said: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent. The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares." In Barwick *v.* English Joint-Stock Bank, L. R. 2 Ex. 259, 266, Willes, J., though using at one place the expression, "in the course of his master's business and for his master's benefit," evidently meaning merely in the discharge of the business intrusted to him, said (page 266): "It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." See, also, Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; Texas Pacific Ry Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463; Cole *v.* Atlanta & West Point R. Co., 102 Ga. 474, 31 S. E. 107; Savannah Street R. Co. *v.* Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am.

St. Rep. 464; Patterson's Ry. Ac. L. 105; Higgins v. Southern Ry. Co., 98 Ga. 751, 25 S. E. 837; Southern Ry. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37; Georgia R. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565.

It is contended that there is a difference between an assault on a passenger, to whom the company owes a duty of protection, and a willful assault upon a stranger or mere passer having no relation with the company, and that the company is not liable for the latter. Cases of willful assaults by an employee upon a mere stranger are not in point. The petition alleges that the conductor did not shoot at the woman killed. He shot at the passenger, and, missing him, hit the woman. Moreover, a railroad company's liability for the willful torts of its agents acting in the scope of their business is not limited to torts on passengers. Some of the cases cited above are based on torts to trespassers and persons not passengers. What we think we have demonstrated is that, under the allegations of the petition, the conductor in dealing with the passenger and shotting at him was acting in the prosecution and scope of the business entrusted to him, within the meaning of the law. If he had hit the passenger, there could be no doubt that the shooting would have been within the rule. If he missed the passenger, did the shooting cease to be within the scope of his business? Shooting at another does not fall within or without the scope of the agent's employment according as his aim is good or bad. Bad markmanship does not alter the status of the agent doing the shooting. If, then, the conduct of the conductor within the car was in law the conduct of the company, why was not the result of that same conduct, taking effect outside the car, also the result of the conduct of the company? It is not easy to see. But it is contended that, although there was an unlawful or negligent act relatively to the passenger, there was no violation of duty toward a passer on the street, and therefore no liability, although she was struck. It is a mistake to say that there was no duty to passers on a public highway not to do wrongful or negligent acts which would naturally tend to injure them. In Fletcher v. Baltimore & Potomac Railroad, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, it was said: "A railroad company owes a duty to the general public, and to individuals who may be in the streets of a town through which its tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could have been prevented by the exercise of reasonable diligence on the part of the company." In that case wood was thrown from a repair train by hands returning from work, and caused injury to one on the highway. The hands were not then engaged in the performance of their duties, but it was shown

that the practice by the men of collecting refuse timber for firewood and throwing it off along the line near their homes had been going on for some time, and that the company was charged with notice of it, and acquiesced in it, or at least it was a question for the jury, and that it as also for them to say whether the company exercised due care to prohibit the custom and prevent the performance of the act. A single act of this kind by a passenger, or an employee outside the scope of his business, would not suffice to charge the company, unless it had reason to anticipate the dangerous act and failed to use proper diligence to prevent it. But where the act is done by the agent of the company in the scope of his employment, and while prosecuting it for the company, the single act is the company's act. Again, it has been held that if in the performance of its business the company, through its agents, negligently sets in motion a force which naturally and proximately causes an injury, it is liable. In Fraser *v.* Charleston & Savannah R. Co., 75 Ga. 222, where wood negligently fell or was thrown from an engine and injured a person on a highway, the case was held to be one for the jury. See, also, Savannah Florida & Western Ry. Co. *v.* Slater, 92 Ga. 391, 17 S. E. 350. In Western & Atlantic R. Co. *v.* Bailey, 105 Ga. 100, 31 S. E. 547, a petition alleged that an engineer, while running a train, saw a trespasser in time to stop before striking him, but nevertheless "carelessly, negligently, recklessly, and wrongfully allowed and permitted" the train to run at a reckless and dangerous rate of speed, without any bell or whistle being sounded and without any effort to stop the train; that the engine struck the trespasser and hurled his body against an employee of the company, who was in his proper place performing his duties, and who was thus injured. It was held that a cause of action on behalf of the injured employee was set out. The ruling was put on the ground that "the negligence of the defendant put in motion the destructive agency, and the injury sustained by the plaintiff was directly attributable thereto," and did not rest on any duty arising from the relation of master and employee. Apparently the fact of employment was mentioned rather to show that the employee was rightfully at the place where he was. The principle involved in the case just cited was impliedly recognized in Georgia R. Co. *v.* Wood, 94 Ga. 124, 21 S. E. 288, 47 Am. St. Rep. 146. In that case a boy who, with others, had previously been in the habit of swinging on trains, attempted to do so on the occasion in question. He desisted, however, and ran off from the train into a private yard, where he was attempting to conceal himself. The brakeman on the train threw a stone at him. The stone, by accident, having missed the boy, hit and injured another person who was then on the same premises. It was held that no presumption arose that at the time of the throwing of the stone the servant was acting in behalf of the company or within

the scope of his employment as to anything then done or attempted to be done with a view to injure or affect the boy; and "consequently the company is not liable for the injury thus done to the third person." Assuming that the employee had authority to keep trespassers off the train, the implication is that, if he had been acting within the scope of his business at the time he threw at the boy, the company would have been liable to the third person. In Alabama Great Southern R. Co. *v.* Chapman, 80 Ala. 615, 2 South. 738, the plaintiff, while walking on the track of the defendant's road, observed an approaching train, and got down on the edge of the embankment just before the train came along. A cow came up on the other side of the embankment, and was thrown from the track by the engine, and bounced down, hit and injured the plaintiff. The plaintiff was not seen by the engineer, owing to the embankment. There was some evidence tending to show that the engineer was negligent. It was held that, if the animal was thrown from the track by the negligence of those in charge of the train, the injury to the plaintiff could not be regarded as a purely accidental occurrence, for which no action would lie, but must be deemed to have been proximately caused by the negligence. In Quill *v.* New York Central R. Co. (Sup.) 11 N. Y. Supp. 80, a person was standing on a highway at a railroad crossing when a passing train collided with a coal cart, which was thrown forward upon him, inflicting injuries which caused his death. It was claimed that the collision between the train and the coal cart was due to negligence on the part of its servant in not giving proper and timely warning of the approaching train. A recovery in favor of the administrator of the decedent was sustained. In Jackson *v.* Galveston Ry. Co., 90 Tex. 372, 38 S. W. 745, a declaration alleged that the plaintiff was repairing the track of the defendant railroad company; that the foreman sent an employee back to signal an approaching train; that the signal was given, but the train was not stopped, owing to the engineer's negligence or the insufficiency of the brakes; that, as the train approached, plaintiff stood aside to escape it; that as it neared plaintiff the fireman, to avoid danger which he properly apprehended, jumped from the engine against the plaintiff, and injured him. It was held that the negligence of the defendant was the proximate cause of the injury. The fact that the plaintiff was an employee appears, from the opinion, to have been stated in order to show that he was rightfully on the ground near the track. Denman, J., in speaking of the act of the fireman in leaping to escape danger caused by the negligence of the defendant or its engineer, said: "His acts, under the circumstances, are in law regarded as would be the movements of an inanimate object set in motion by such negligence." In Osborne *v.* Van Dyke, 113 Iowa, 557, 85 N. W. 784, 54 L. R. A. 367, an employee was holding a horse while the master applied some medi-

cine to its neck. The horse jumped, and defendant began beating it with a heavy stick with a nail drawn through it, and, by reason of defendant's foot slipping, he unintentionally hit the plaintiff on the nose, causing injury. It was held that an instruction that the defendant would not be liable if in beating the horse he exercised reasonable care to avoid striking the plaintiff, and the blow which inflicted the injury was caused by an accidental slip, was erroneous, since the slipping of defendant's foot, being the consequences of his own wrongful act, was not an excuse for the injury. In 1 Addison on Torts (Wood's Ed.) 4, it was said: "If the damage done is the immediate result of force exercised by the defendant in a place where the probable and natural result of misdirected force would be to cause injury to others, the defendant will be responsible for the damage done, though it happened accidentally, or by misfortune, unless the force was used strictly in self-defense." In James *v.* Campbell, 5 Car. & P. 373, Mr. Justice Bosanquet instructed the jury that, if one of two persons fighting unintentionally struck a third, he was answerable in an action for assault, and the absence of intention could only be urged in mitigation of damages. In the celebrated case of Scott *v.* Shepherd, 2 W. Bl. 892, 1 Smith's Leading Cases (9th Ed.) 737, it was held that an action for damages would lie for originally throwing a squib which after having been thrown about in self-defense by other persons, at last put out the plaintiff's eye. There was some difference of opinion among the judges as to whether the proper form of action was in trespass or on the case.

Was the killing of Mrs. Wheeler the proximate result of the conduct of the company and its conductor? The definitions of proximate cause and proximate result in the text-books and reports vary very much in expression, and sometimes in idea. Prof. Jaggard says that, in determining what is a proximate and what is a remote consequence, the English courts incline to accept the measure of damages as (a) directly and necessarily result from the wrong complained of; (b) such further damages as should have been foreseen by the wrongdoer, in view of his knowledge, actual or constructive, of the special circumstances of the case. He asserts that the American courts do not seem to have determined very definitely whether the test is (2) what a reasonably prudent man should have foreseen under the circumstances, (b) what follows as a natural result in the ordinary course and constitution of nature. 1 Jaggard, Torts, 372. These two tests applied by the American courts may not be so far apart as they at first appear, since it would seem that what follows as a natural result in the ordinary course and constitution of nature ought to be foreseen by a reasonably prudent man. Section 3913 of the Civil Code of 1895, above quoted, in stating the rule, uses the expression, "damages which

are the legal and natural result of the act done," though contingent to some extent; but states that damages traceable to the act, but not its legal or "material" consequences, are too remote. The word "material" seems to be inapt, and, as in the first part of the section the language is "legal and natural," it would appear to the writer that probably the word "material" originally found its way into the section by inadvertence or misprint, and that the same expression, "legal and natural," was intended to be used. This, however, is merely conjectural. In Atchison, T. & S. F. Ry. Co. *v.* Parry, 67 Kan. 515, 73 Pac. 105, it was held that "negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result." This is quoted approvingly in Western & Atlantic R. Co. *v.* Bryant, 123 Ga. 77-83, 51 S. E. 20. In Mayor & Council of Macon *v.* Dykes, 103 Ga. 847, 848, 31 S. E. 443, it was said that "the rule is that, in order to recover for an injury alleged to have resulted from the negligence of another, the injury must be the natural and probable consequence of the negligence; or, as otherwise stated, the wrong and resulting damage must be known, by common experience, to be naturally and usually in sequence. The damage, according to the usual course of events, must follow from the wrong. The principle in this state seems to be substantially the same." In 1 Searman & Redfield on Negligence (5th Ed.) § 29, it is said: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." In Insurance Co. *v.* Boon, 95 U. S. 117, 130, 24 L. Ed. 395, it is said: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." See, also, Southern Ry. Co. *v.* Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; Thompson on Negligence, § 59; St. Louis Ry. Co. *v.* McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54.

3. It requires no argument to show that it was negligent to knowingly place a drunken conductor armed with a pistol and of bad habits in charge of a passenger car, traversing the streets of a city, or at least that it should be left to the jury to determine whether this was not negligent. As a matter of law, on demurrer,

we cannot say that this was not an act of negligence. It was contended that the homicide was not the natural and probable result of such act on the part of the company. But we know nothing more apt to endanger life and safety than to place in control of a passenger street car the combination of a dangerous character, a conductor loaded with whisky, and a pistol loaded with powder and ball. In Christian *v.* Columbus & Rome Ry. Co., 79 Ga. 460, 7 S. E. 216, it was held that if a railroad company employed an agent and assigned him to duty with knowledge that he was insane, or of his being subject to sudden fits of insanity, it would not be excused from responsibility for a homicide committed by him while engaged in its business. See, also, Central Ry. Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; Kerlin *v.* Chicago R. Co. (C. C.) 50 Fed. 185; Williams *v.* Missouri Pacific Ry. Co., 109 Mo. 475, 18 S. W. 1098. If the company negligently assigned the conductor to take charge of the car, and, while acting in the general scope of the business entrusted to him, he wrongfully shot at a passenger, and as a proximate consequence thereof a person passing on the highway was killed, the company would be liable.

It is urged that the decision in Belding *v.* Johnson, 86 Ga. 177, 12 S. E. 304, 11 L. R. A. 53, is controlling as to liability not resulting from the placing of the drunken conductor in charge of the car. In that case it was alleged that a saloon keeper sold and continued to furnish liquor to a person who was drunk, knowing that such person, when under the influence of liquor, was dangerous. The person so furnished shot and killed another while thus drunk. On demurrer it was held that the homicide was not the proximate result of the sale of the liquor. This differs materially from the present case. A mere sale of liquor to a drunken customer is not at all the same as knowingly to place a drunken employee, armed with a pistol, in charge of a car, with the duty of controlling it, dealing with passengers and conducting a part of its business. In Brazil *v.* Peterson, 44 Minn. 212, 46 N. W. 331, where a barkeeper assaulted a person who was in the saloon in an intoxicated and helpless condition, the court held that the proprietor of the saloon was liable.

What facts may be developed by the evidence we cannot, of course, foresee, but the court properly overruled the demurrer and retained the case for submission to the jury on the evidence.

Judgment affirmed. All the Justices concur.

GIBNEY *v.* ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 2, June 11, 1907.)

[103 S. W. Rep. 43.]

Appeal—Record—Questions Presented for Review.—Where a change of venue was granted on an application made without notice after the examination of jurors was completed and before any challenges were made, but it did not appear that any exception was saved, nor that the question was raised in the motion for a new trial, the action cannot be reviewed on appeal.

New Trial—Grounds—Disqualification of Juror—"Strking" Employee.—In an action against a street railway company for personal injuries, a juror on his voir dire testified that he had no business relations with or interest in the defendant company, and that he had no bias or prejudice against the parties, or either of them. It afterwards appeared that the juror had been an employee of defendant company, who had gone on a strike, which had continued for several months, during which feeling ran high and defendant's tracks were demolished by dynamite. A motion for a new trial was made on that ground, and on the hearing the juror was offered as a witness for plaintiff. He did not admit that he was one of the strikers, nor did he deny the charge made against him, but repeated that he had no prejudice either way. It was shown by affidavits that he was one of the leaders in the strike. An unusually large verdict was returned by the jury. Held, that a new trial should have been granted.

Damages—Grounds—Expenses—Nursing by Family.*—In an action for personal injuries, where plaintiff was nursed only by members of her family, and there was no express contract to pay them, expenses incurred for nursing was not a proper element of damages.

Same—Carriers—Personal Injuries—Damages—Excessive Damages.—In an action by a passenger for personal injuries, the testimony of plaintiff showed that she was 52 years of age, and had been in perfect health prior to the accident, and was earning from $30 to $40 per week, and that she had suffered a great deal of pain in her back, dizziness in her head, numbness in her limbs, and severe pains in her hips and legs; that she could get around the room with great difficulty; that she was unable to work or take care of herself, and was as helpless as a child; that she had paid $10 to a physician for consultation and $35 to a masseuse, but two larger doctor bills had not been paid. A physician testified that she showed evidence of traumatic neurasthenia and appeared to be losing strength. He diagnosed the case as traumatic or railroad spine. Another physician, a specialist, treated plaintiff for about 10 months. He found her condition a nervous one, with symptoms of concussion of the

*See note, 12 Am. & Eng. R. Cas., N. S., 195.

spine. He considered plaintiff an invalid who would never permanently recover. Another physician testified that she was suffering from neurasthenia or nervous exhaustion; that she had suffered a great deal of pain, but presented no evidence of any organic disease. He could not state whether the condition was permanent or temporary. Defendant's surgeon, who treated plaintiff for about two weeks immediately after the accident, testified that a week or ten days later, he went to see her, saw her sitting by the window, but, after being admitted to the house, found that she had gone upstairs and had gotten into bed with her clothes and shoes on. A physician appointed by the court to examine plaintiff did so in the presence of her physician. In his opinion she had no permanent injuries. He was a specialist in neurosis. Held, that a verdict of $30,000 was excessive.

Appeal from Circuit Court, Montgomery County; Elliott M. Hughes, Judge.

Action by E. A. Gibney against the St. Louis Transit Company. From a judgment for plaintiff, and an order refusing a new trial, defendant appeals. Reversed and remanded.

Boyle & Priest and *Edward T. Miller,* for appellant.
A. R. Taylor, for respondent.

BURGESS, J. This is an action for damages for personal injuries alleged to have been sustained by plaintiff on the 13th day of June, 1902, by being thrown from defendant's car by reason of its premature start whilst plaintiff was in the act of alighting therefrom at the corner of Taylor and Washington avenues, in the city of St. Louis. The action was instituted in the circuit court of the city of St. Louis, and afterwards, on the 18th day of April, 1903, on application of plaintiff for a change of venue, the cause was transferred to the circuit court of Montgomery county where plaintiff, upon trial, had recovered a verdict and judgment for the sum of $30,000. Defendant filed motion for new trial, and afterwards, and within four days after the rendition of the verdict, filed a supplemental motion for a new trial, and also motion in arrest of judgment, which motions were by the court overruled, and defendant appealed.

The petition is in the usual form of an action by an injured passenger against a carrier, and charged, in substance: That the defendant at the times alleged was a corporation by virtue of the law of Missouri, and used and operated the railway and car mentioned for the purpose of carrying passengers for hire from one point to another in the city of St. Louis as a street railway company. "That on the 13th day of June, 1902, the defendant, by its servants in charge of its car, received the plaintiff as a passenger thereon, and for a valuable consideration by the plaintiff

paid to the defendant undertook and agreed with the plaintiff to carry her safely as a passenger on said car to her point of destination on defendant's line, and to then stop said car, to wit, Washington Boulevard (or avenue) and Taylor avenue, in the city of St. Louis, and allow plaintiff a reasonable time and opportunity to alight in safety. Avers that the defendant, unmindful of its undertaking and of its duty in the premises, did, by its servants in charge of said car, whilst it was stopped at the plaintiff's said point of destination to enable passengers, including the plaintiff, to alight from said car, and whilst the plaintiff was in the act of alighting from said car, and before she had a reasonable time or opportunity to do so, negligently caused and suffered said car to be started in motion, whereby the plaintiff was thrown and caused to fall from said car to the street, and to be thereby permanently injured upon the spine, chest, and body, and also to sustain a great and permanent injury to the nervous system, and also to be injured internally." The petition then sets up an ordinance of the city of St. Louis prohibiting conductors from allowing women to enter or leave cars whilst in motion, and a disregard of this ordinance, and claimed that such violation of this ordinance contributed to cause plaintiff's injuries, and alleges her injuries as follows: "That by her injuries, caused as aforesaid, the plaintiff has suffered and will suffer great pain of body and mind; has been permanently crippled; has been permanently disabled from carrying on her business as a keeper of boarders, and carrying on business as a saleswoman and other business, and has been permanently disabled from labor; has been made an invalid for life; has incurred and will incur large expenses for medicines, and surgical attention, and nursing—to her damage in the sum of $50,000, for which sum she prays judgment." The answer was a general denial and a plea of contributory negligence on the part of the plaintiff in alighting from a moving car at a time and place when and where the same had been stopped for the purpose of permitting passengers to alight thereform. The reply was a general denial.

Upon almost every salient fact in evidence in this case the testimony on behalf of the opposing parties is in direct conflict. Plaintiff's evidence tended to prove that she was 52 years of age, had lived in St. Louis about 12 years, and that her health had been perfect prior to the accident. She was connected with a medical firm, and traveled, lectured, and sold a certain proprietary medicine, call "Granagophone," for women only. Her earnings from this employment averaged $30 or $40 per week. She also kept boarders; but there is no evidence as to the earnings or profits she derived from such business. At about 8 o'clock on the evening of June 13, 1902, at Spring and Olive streets, in the city of St. Louis, plaintiff, accompanied by her daughter Marguerite, boarded one of defendant's cars whose course was west

on Olive street and north on Taylor evenue. The car had seats running crosswise from side to side, and a step or running board along the side of the car from end to end, for the use of passengers in boarding the car or alighting therefrom. At the end of each seat was an upright standard, in which was an electric button, by means of which passengers indicated to the conductor their desire to have the car stopped. Plaintiff boarded the car at the right side, and sat at the end of the third or fourth seat from the front, being thus close to the running board and on the east side of the car as it was going north of Taylor avenue. Just before reaching Washington Boulevard she rang the bell twice for the car to stop, whereupon her daughter asked her why she rang it the second time, and she replied: "The conductor is doubly warned that we want to get off." When the car stopped she got up from the seat, stepped on the running board preparatory to alighting, and while in that position the car started, throwing her to the street and into the gutter by the pavement. Plaintiff's description of the accident was substantially corroborated by the testimony of her daughter Marguerite, who sat beside her on the car, and also by the testimony of witnesses Finnegan and Stone, passengers thereon. It further appears from their testimony that plaintiff fell about 2 feet from the curbing on the east side of the street, and remained there until she received assistance; that five or six passengers alighted from the car at the point, whilst plaintiff was leaving the car, two of which passengers were women; that while plaintiff was standing on the running board the signal for starting the car was given, and that the signal to stop was given just after she fell, but that the car ran about 100 feet before it came to a standstill; that at the time plaintiff was standing on the running board she was facing north, the direction in which the car was going. Plaintiff was assisted to her home by her daughter and a Mr. Bartley, and she was immediately put in bed by her daughters. Her left hip was bruised and very sore for a good while, and then trouble to her spine ensued. Dr. Brokaw, the defendant's surgeon, called on plaintiff the morning after the accident and continued to treat two weeks. After Dr. Brokaw ceased to treat her, Dr. Witherspoon was called in; but, he not being a specialist in spinal trouble, he recommended Dr. Crandall, who was called in, and he continued to treat the plaintiff up to the time of the trial.

Plaintiff's evidence further tended to show that since her injury she was unable to do any work, or even take care of herself; that she was unable to take a bath without assistance, and was as helpless as a child. She suffered a great deal of pain in her back, dizziness in her head, numbness in her limbs, and severe pain in her hips and legs. She could get around a room by holding onto things for support and taking short steps, but since her injury she has not been out of the house, except when carried out. Her

expenses for medicines were estimated by her daughter at from $3 to $5 a week. Dr. Fry's bill for $10 was paid by her. Mrs. Talbott, a messeuse, was paid $35 for treatment; but neither Dr. Crandall nor Dr. Witherspoon had yet presented his bill. Plaintiff was nursed through her suffering by her daughters, who, she said, were over 18 years of age. Her daughter Marguerite testified, over defendant's objection, that the reasonable value of a nurse's service in the city of St. Louis was $3 a day and $3 a night, although she had never nursed for hire herself, and had only seen bills presented by nurses. When Dr. Witherspoon was called to treat plaintiff, two or three weeks after the accident, he found no broken bones and no marks of physical injury. She showed evidence of traumatic neurasthenia, such as senstive points along the spine. She was subject to dizziness at times, and appeared to be losing strength. He diagnosed the case as traumatic or "railroad spine"; but, as he was not a specialist in that line, he called in Dr. Crandall. The latter began treating plaintiff on July 10, 1902, about a month after the accident, and she was still under his care at the time of the trial. He found her condition was a nervous one, and on examination concluded that she had suffered concussion of the spine. She complained of dizziness, headache, and sleeplessness, and walked with great difficulty and pain, all of which are symptoms of concussion of the spine, which is caused by a severe jar of the spinal column. In his opinion plaintiff was an invalid, and would never permanently recover, and there was a possibility of a more serious organic condition developing. The symptoms were characteristic of nervous prostrations of any kind. The witness testified that the value of a trained nurse's service was $3 a day and $3 a night. His own bill was about $300. Dr. Frank R. Fry examined plaintiff after consultation with Dr. Crandall, and testified that she was suffering from neurasthenia, or nervous exhaustion. She had suffered a great deal of pain, but presented no evidence of any organic disease, nor did she have any wounds of any kind upon her person. Witness was unable to say whether the condition was permanent or only temporary, but in his judgment she would never recover from her neurasthenia. He further testified that very often persons having troubles similar to the plaintiff's become well by a settlement of the litigation growing out of their injuries.

Plaintiff next offered in evidence the fifth paragraph of section 1760 of the ordinances of the city of St. Louis, which was the paragraph defendant was charged with having violated, providing that "conductors shall not allow ladies and children to leave or enter cars while the same are in motion."

Defendant's evidence tended to prove that the conductor, who was standing on the rear platform, gave the motorman a signal to stop the car in obedience to plaintiff's signal that she intended to alight. While the car was slowing down plaintiff stepped off

the car to the street, which was wet and slippery, and fell; the car continuing to run about 8 or 10 feet thereafter. The conductor did not see her as she got up from her seat and stepped onto the running board, but saw her afterward when she was attempting to arise from the ground. The court permitted plaintiff, over repeated objections by defendant, to ask the conductor as to alleged statements as to how the accident occurred, made by him to plaintiff and others in the presence of various witnesses after plaintiff had gotten up from the street. To contradict the answers made by the conductor to these questions, plaintiff in rebuttal, over defendant's objections, was permitted to introduce the testimony of plaintiff and witnesses Stone andMarguerite Gibney. Dr. Dinsbeer, a passenger on the car, sitting four or five seats behind plaintiff, saw her get up in the car and step to the ground before the car had come to a stop at the crossing. In alighting her back was towards the front of the car and she fell backward. Charles S. Crawford, of Crawford & Newby, general paint manufacturers, who sat near the rear end of the car on the east side, testified that while the car was slowing up for the crossing he saw plaintiff deliberately step off the car backward, keep her equilibirum a second or two, and then fall over; the car running about 10 or 12 feet before stopping. J. D. Donnoway was sitting in the front seat (which was reversed), facing the rear of the car and near the running board. He saw plaintiff, while the car was slowing down, step off backward and fall to the street. J. H. Brigham, sitting on the seat with Donnoway, testified that, when the car was approaching Washington avenue, plaintiff got up to get off, and just before the car stopped she stepped down to the running board and stepped off the car backward; the car running 6 or 8 feet further. Dr. A. V. L. Brokaw examined plaintiff the day after the accident, and attended her about two weeks. A week or ten days after he ceased treating her he went to see her, and when he reached the house she was sitting by the window. He waited a few minutes for some one to let him in, and when he was admitted to the house he found that plaintiff had gone upstairs and gotten in bed with her clothes and shoes on. After that he did not go to see her any more. Dr. Paul Y. Tupper was appointed by the St. Louis court to examine plaintiff. This he did in the presence of plaintiff's physician, Dr. Crandall, in April, 1903. He found plaintiff in bed, rather pale, but nutrition fairly good. She was a little unsteady on her feet, but the reflexes were normal. Her muscles were in fair condition. There was no lack of symmetry in the legs and thighs. There were no objective evidences of injury, and in his opinion she had no permanent injuries. Dr. Tupper further testified that neurosis is not his specialty, and a neurologist skilled in that subject, who had attended plaintiff for a year or two, would have opportunities superior to his for ascertaining her condition.

The first question presented for consideration upon this appeal is as to the action of the court in granting, upon the application of plaintiff, a change of venue from the circuit court of the city of St. Louis, where the action was first instituted. It appears from the record that the case was called for trial on April 13, 1903, when the parties answered for trial, and, upon application of the defendant, a penal of special jurors was summoned for the trial of the cause. On the 17th day of April, 1903, the parties again answering ready for trial, the jurors composing the special venire were called into the jury box, and duly sworn by the clerk to true answers make to such questions as might be pronounced to them touching their qualifications to sit as jurors in the trial of the cause; but, being unable to finish the impaneling of the jury on said day, the court adjourned until the 18th day of April, 1903, when the panel was completed. Both parties then announced that they did not desire to examine the jurors further, but before the challenges were made and the panel of 12 selected to try the case, plaintiff filed an affidavit praying for a change of venue upon the ground that defendant had undue influence over the inhabitants of the city of St. Louis; that she obtained information and knowledge of such influence on the 18th day of April, 1903; and that a special jury had been awarded by the court for the trial of the cause, on the application of the defendant. Defendant objected to the consideration of the application for change of venue upon the ground that no notice had been given defendant or its attorney, and that the application was presented too late, which said objections the court overruled and awarded a change of venue, sending the cause to the circuit court of Montgomery county. It does not appear from the bill of exceptions that the defendant saved an exception at the time to an action of the court in awarding the change of venue, which defendant should have done in order to have the action of the court in that particular reviewed here. Stearns *v.* St. L. & S. F. Ry. Co., 94 Mo. 317, 7 S. W. 270; State ex rel. *v.* McKee, 150 Mo. 233, 51 S. W. 421. Nor was any point made in this regard in the motion for a new trial, which was likewise necessary, and in the absence of which the action of the court will not be reviewed by the Supreme Court. Koltz *v.* Pertect, 101 Mo. 213, 13 S. W. 955.

One of the grounds for new trial assigned by defendant in its motion is that one of the jurors trying the cause was prejudiced and biased. The juror Samuel A. Moore upon his voir dire examination testified in effect that he had no business relations with or interest in the St. Louis Transit Company, and that he had no bias or prejudice against the parties, or either of them. Upon these statements he was accepted by both sides as a competent and qualified juror. After the case had been submitted to the jury it was learned that Moore was one of a large number of employees of the defendant company who went on a strike

in the city of St. Louis in May, 1900; the strike continuing for several months during which time feeling between the strikers and their employers ran high, defendant's tracks were demolished by dynamite, and crimes, some amounting to felonies, were committed by the strikers. As soon as defendant's counsel learned that Moore took part in said strike, the court was informed thereof. When the motion for new trial was heard, Moore was offered as a witness for plaintiff. He did not deny any of the charges made against him; his examination and evidence being confined solely to the questions asked on the voir dire: "Q. On the hearing of the voir dire—that is to say, on the inquiry of the jury as to their qualifications—was there any question asked you by me or by counsel for defendant as to whether or not you had ever been in the service of the defendant, St. Louis Transit Company? A. There was not. Q. Do you remember the question I put to you was this: 'Have you any relation of business or interest with the St. Louis Transit Company?' Do you remember that question? A. Yes, sir. Q. Well, what other question, if any, was asked you with regard to your relation with the Transit Company? A. There was none that I have any recollection of. Q. What further question was asked you as a juror? A. I don't remember what was asked. I don't remember. Q. Do you remember whether or not you were asked the question as to whether or not you had any bias or prejudice against the parties, or either of them? A. Yes, sir; I think I remember that. Q. What was your answer? A. My answer was I was not prejudiced in any way. Q. I will ask you if you did, as a matter of fact, have any prejudice either way in that case? A. No sir." The juror, however, did not admit or deny that he was an employee of the defendant at the time of the strike, or that he was one of the strikers. It was shown by numerous affidavits filed by defendant in support of its motion for new trial that Moore was one of the leaders in said strike, during and on account of which a bitter feeling of hatred existed on the part of said strikers and others against the defendant, its officials, and those who refused to strike with them.

It is insisted by defendant that, aside from the issue of fact arising out of the juror's examination, the questions that Moore admitted were asked him required that he advise defendant's counsel of his disqualifications. Upon the other hand, plaintiff contends that, although Moore may have been prejudiced against the defendant at the time of the strike, some three years before the trial, there was no evidence that he still retained the prejudice at the time of the trial, there having been a change in the management of the company in the meantime, and especially in view of the fact that on the hearing of the jury on the voir dire the said juror swore that he had no prejudice, and again swore on the hearing of the motion for a new trial that he had no such preju-

dice. Moore admitted that he was asked upon his voir dire examination if he had any bias or prejudice against the parties, or either of them, and that his answer was, "I was not prejudiced in any way." Nevertheless, the evidence clearly shows that this juror was, at the time of the strike, biased and prejudiced against the defendant; and when asked upon his voir dire examination if he had any bias or prejudice against the defendant, he should, in justice to himself and in fairness to the defendant, have disclosed the fact of his connection with the strike. Would any sane person, whose property rights were involved in a lawsuit, knowingly and without objection permit a man to serve as a juror thereon who had, within three years next preceding, assisted in the wanton destruction of his property, although such juror should answer upon his voir dire examination that he was not biased or prejudiced in any way? We think not. It is conceded by plaintiff's counsel that at the time of the strike Moore had resentment; but it is claimed, without any evidence to that effect except the sworn statement of Moore himself, that it is probable that, after the lapse of three years, with conditions changed, his feeling of prejudice had subsided. Men differ so much in respect of their ability and disposition to bear malice that it will not do to say or assume that any particular person, who has become prejudiced against another, ceased to bear malice against him at any particular time, if at all. Besides, the general rule is that a certain state of facts, once shown to exist, is presumed to continue until the contrary is shown. In Pearcy *v.* Insurance Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673, a juror named Bowman was asked whether he or any member of his family held any life insurance policy issued by the defendant. Appellee's affidavits showed that he was asked, "Did any of you hold a policy of life insurance issued by the defendant?" Bowman's affidavit stated that he was asked, "Did you hold a policy of life insurance issued by the Michigan Mutual Life Insurance Company?" But he did not deny the admitted fact that he had taken out a policy for the benefit of his wife. He also stated in his affidavit that he was influenced solely by the law and the evidence in making his verdict. The court said: "We think that the question asked the juror required him to answer as to the policy taken out on his own life for the benefit of his wife. This is our conclusion upon the assumption that the question was that which appellee maintains it was. It was not incumbent upon appellee to minutely cover by a long series of specific questions all phrases of the subject; but it was enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit. It seems clear that such a question as was asked Bowman ought to have drawn from him the fact that he had taken out a policy on his own life for the benefit of his wife; for the question certainly indicated that information as to his interest in the com-

pany, as well as his connection with it, was sought by the counsel conducting the examination." In the case of Heasley *v.* Nichols, 80 Pac. 769, 38 Wash. 485, similar in many respects to this case, it was said: "If the true condition of his [the juror's] mind had been made known to the court before he was accepted as a juror, he would have been excluded at once. The parties had a right to rely upon his sworn statement, and waived nothing by accepting him as a juror. But, when the attention of the court was called to the condition of the juror's mind in a proper way, it was the duty of the court to rectify the mistake by granting a new trial." In Theobald *v.* St. Louis Transit Company, 191 Mo. 395, 90 S. W. 354, it is said: "There is no feature of a trial more important and more necessary to the pure and just administration of the law than that every litigant be accorded a fair trial before a jury who enter upon the trial wholly disinterested and unprejudiced," and "it is for the court, and not for the juror, to determine his qualification. The determination should not be made to depend upon the conclusion of the juror as whether or not he could or would divest himself of a prejudice which the evidence shows existed." That the juror was prejudiced against the defendant, and was not for that reason a competent juror, was shown by the affidavits filed in the court below; and this fact was further emphasized by the exceedingly large and unjustifiable verdict rendered by the jury. That the defendant would not have permitted Moore to serve on the jury without objection, had its counsel been in possession of the facts disclosed by the affidavits, no one will doubt, and when the attention of the court was called to these facts it should have rectified the mistake by granting a new trial.

Plaintiff's instruction No. 5 is criticised upon several grounds, only one of which (the third) will be necessary to notice. By this instruction the plaintiff was allowed to recover, by way of damages, "any expenses necessarily incurred for nursing." The only persons who attended plaintiff as nurses were her daughters, members of her family. There was no express contract to pay them for their services, and defendant contends that the services are presumed to have been rendered gratuitously. As a rule such services involve no legal liability upon the part of the person for whom rendered, and therefore afford no basis for a claim. In Voorhies on Damages for Personal Injuries, § 18, it is said: "The injured person cannot recover as expenses the value of the services of any one of his family in nursing him, unless there was an express agreement by him to pay therefor. Such nursing involves no legal liability on his part, and therefore affords no basis for a claim against the defendant, as for expenses paid. In the absence of an express contract the law will not presume one so long as the family relation continues. An injured person may hire an adult member of his family to nurse him, or to prescribe

for him as a physician, in the same manner and with like effect that he may hire a stranger." The same rule is announced in Goodhart *v.* Railroad, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705, in which it is said: "The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children, administering to his needs, involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against the defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and to the same effect that he may hire other persons; but in the absence of an express contract the law will not presume one so long as the family relation continues." This case was followed and approved by this court in Morris *v.* Grand Avenue Ry. Co., 144 Mo. 500, 46 S. W. 170. That the authorities upon this subject are not entirely uniform may be conceded; but we think the rule announced in the Morris Case and by the authorities which it follows is sustained by the better reason. It follows that said instruction is erroneous.

The verdict is so manifestly excessive, and so out of reason, when considered in connection with the facts in relation to plaintiff's injuries, their nature and extent, and their probable effect upon her health in the future, and the expenses necessarily incurred for medical treatment, that the ends of justice will be best subserved by reversing the judgment and remanding the cause for another trial.

The judgment is reversed, and the cause remanded. All concur.

ABELSON *v.* ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, Oct. 28, 1907.)

[105 S. W. Rep. 81.]

Witnesses—Cross-Examination as to Bias.—Though plaintiff is entitled to show the bias of a witness for defendant as affecting his credibility, yet said witness having, in answer to plaintiff's questions, stated that he did not have a pass over defendant's railroad, that he had known for five or six years the conductor of the train on which plaintiff was injured, and that he did not remember whether he had paid his fare on that particular day, there was no error in sustaining an objection to the question whether the conductor was not in the habit of letting witness ride free at and prior to that time, as a long detail by witness of his relations with the conductor could not have been of more aid to the jury.

Carriers—Injury to Passengers—Contributory Negligence.*—A passenger on the caboose of a local freight, whose injury is contributed to by his getting up before the train stops, may be found guilty of contributory negligence in so doing after warning, though he did not hear the conductor tell the passengers, after the train began to slow up, to keep their seats till the station was reached; there having been a notice in the car, headed in large capital letters, "Warning! Notice! Danger!" which forbade passengers to stand up while the train was in motion, and he having previously frequently ridden on local freight trains, and known that similar warnings were posted in them.

Appeal from Circuit Court, Miller County; J. M. Carter, Judge.

Action by M. Abelson against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Instructions were given by the court at the request of plaintiff as follows:

"(1) If the jury find from a preponderance of the evidence that the plaintiff was a passenger on one of the defendant's trains, and that, while in the exercise of due care and while upon the said train, he received injuries as alleged in the complaint, then you are instructed that this is in law a prima facie case of

*For the authorities in this series on the question whether it is contributory negligence in a passenger to stand in a moving car, see foot-notes appended to Foley *v.* Boston & M. R. R. (Mass.), 23 R. R. R. 32, 46 Am. & Eng. R. Cas., N. S., 32; Bromley *v.* New York, etc., R. Co. (Mass.), 23 R. R. R. 11, 46 Am. & Eng. R. Cas., N. S., 11; foot-notes appended to Weeks *v.* Boston Elev. Ry. Co. (Mass.), 24 R. R. R. 177, 47 Am. & Eng. R. Cas., N. S., 177; Cottrell *v.* Partucket St. Ry. Co. (R. I.), 22 R. R. R. 853, 45 Am. & Eng. R. Cas., N. S., 853.

negligence on the part of the defendant company, and the burden then shifts to the defendant to show that such injuries were not caused by any negligence on its part.

"(2) The court instructs the jury that although a person, in taking passage on a freight train, assumes such risks as are ordinarily incident to such mode of conveyance when properly handled by the trainmen, still, if the defendant in the case at bar undertook to carry passengers on this train, and if plaintiff was a passenger thereon, then it became and was the duty of the defendant to exercise the highest degree of care, skill, and diligence in the practical operation of its said train, which a reasonably prudent and cautious man would exercise and which is reasonably consistent with the mode of conveyance and the practical operation of its said train and road, and for any omission of these duties, whereby injury results to the passenger, defendant would be liable.

"(3) The court instructs the jury that, if they find from a preponderance of the evidence that plaintiff was a passenger on said train for the station of Homan, then it became and was the duty of the said defendant to cause its said train to stop at Homan and remain at a standstill for a reasonable length of time, sufficient to enable plaintiff to alight therefrom in safety, in the exercise of ordinary care and diligence on his part; and if in this case you should find from a preponderance of the evidence that the station of Homan was announced by the defendant, and thereafter the train came to a stop, and that plaintiff thereupon immediately proceeded to the platform of the caboose and was attempting to alight therefrom, and that the train of defendant upon which the plaintiff was riding was suddenly moved by the defendant, and that plaintiff was thereby, while in the exercise of ordinary care, injured, then is the plaintiff entitled to recover.

"(4) If the jury believe from the evidence that the plaintiff was injured by reason of the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence, unless it appears from the evidence that the plaintiff himself failed in the exercise of ordinary care and prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault. Contributory negligence will not be presumed, but must be proven by a preponderance of the evidence.

"(5) If the jury should find from the evidence that plaintiff was a passenger on defendant's train, and that the station of Homan was announced, or that such train had arrived at such station, and that plaintiff, while the train was moving slowly, went out upon the platform of the car in which he was riding, to be in readiness to step off when such car fully stopped, and that, instead of stopping fully, such car moved violently and suddenly, and with greater violence than is ordinarily incident to the move-

ment of a freight train, and that by reason of such sudden and violent movement plaintiff was thrown and injured, it is for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the plaintiff was guilty of contributory negligence; and if you further believe that the plaintiff did under the circumstances what an ordinarily prudent man would have done, then he was not guilty of contributory negligence, and is entitled to recover in this case."

Instructions were given by the court for defendant as follows:

"(2½) If you find from the evidence that the injury was caused or contributed to by the plaintiff's getting up before the train came to a stop, and after passengers had been warned to keep their seats, your verdict must be for the defendant.

(3) You are instructed that the defendant is not an insurer of its passengers, but that it is only liable for negligence. Therefore, if you find from the evidence that the defendant's servants acted with due care at the time, the plaintiff cannot recover, and your verdict should be for the defendant.

"(4) A passenger should inform himself of the carrier's regulations, and should occupy a seat inside the car, and if he negligently stands or gets up to get off while the train is moving, and this conduct on his part contributes to produce the injury of which he complains, he cannot recover, and your verdict should be for the defendant.

"(5) It is well settled that one who is injured by the mere negligence of another cannot recover any compensation for the injury, if he by his own ordinary negligence contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him. Therefore, if you find from the evidence that the plaintiff negligently got up while the car was moving and undertook to get off, and that this act in any degree contributed to produce the injury of which he complains, he cannot recover, and your verdict must be for the defendant."

"(8) If you find from the evidence that the plaintiff was a passenger on a freight train, then he was bound to know that it was not operated like a passenger train, that it did switching, and that the jolts and jars were greater than on a passenger train; and if his failure to exercise care with reference to any of these things contributed to produce the injury of which he complains, this bars his recovery, and your verdict must be for the defendant."

John N. Cook and *Scott & Head,* for appellant.

T. M. Mehaffy, for appellee.

HART, J. Appellant, Abelson, got on the caboose of the appellee's local freight train in Texarkana to go to Homan. Abelson testifies that "the station, Homan, was called out, and that the train stopped; that he got up from his seat, and went out to the

back of the caboose, on the first step; that just as he got there the train gave a jerk and slapped him with a piece of iron on the face; that he had ridden on local freight trains before; that he was badly injured, and suffered for about five weeks." In cross-examination he stated that he did not hear the conductor warn the passengers to keep their seats until the train stopped. Other testimony was introduced to corroborate his statements. The defendant railway company introduced one Coleman, who testified that he was a passenger on the local freight the day that Abelson was injured; that when the train began to slow up the passengers began to get up, when the conductor told them to keep their seats until they reached the station; that all the passengers except two kept their seats. The conductor testified that there was a notice posted up in the car warning passengers that they were forbidden to occupy the movable seats, or to stand up while the train was in motion or switching was being done. The other facts are sufficiently stated in the opinion. This is an action to recover damages which plaintiff, Abelson, alleges that he suffered on account of the negligence on the railroad company. The defendant company set up contributory negligence on the part of the plaintiff. There was a verdict and judgment for the defendant.

Counsel for the appellant contend that the court erred in refusing to allow the witness Coleman to answer questions as to whether or not he had been riding free on the local freight trains of the defendant by permission of the conductors. The testimony on that point is as follows: "Q. You say you were a passenger on the train that day. Did you pay your fare on that day? A. I cannot tell you. I think I did. Mr. Mehaffy (defendant's counsel): We object. It does not make any difference whether he paid his fare or not." The objection was by the court sustained, and the plaintiff then and there excepted. "Q. Have you got a pass over the road? A. No, sir. Q. You know this conductor, don't you? A. Yes, sir. Q. How long have you known him? A. I do not know. I have known him five or six years; quite a number. Q. Wasn't he in the habit of letting you ride free on the train at the time and prior to the time of the injury?" The defendant objected to the question. "Mr. Head: We have a right to show the bias of this witness, if any. If this conductor allowed this witness to ride for nothing I think it proper to prove it." The court sustained the objection, and the plaintiff excepted. It was decided in the case of Kansas City Southern Ry. Co. v. Belknap, 80 Ark. 591, 98 S. W. 366, that it is always proper to show the bias or prejudice of a witness toward a party litigant as affecting his credibility. In this case the witness answered that he did not have a pass over the road of the defendant company and that he had known the conductor five or six years. After the witness had stated that

he did not remember whether or not he had paid his fare on that particular day, counsel for the defendant objected to his answer. The court sustained his objection, but did not withdraw the testimony from the jury. A long and tedious detail by the witness concerning his relations with the conductor could not have been of more aid to the jury in their deliberations. We do not think the court erred in sustaining an objection to further examination of the witness on this point.

The objection to the instructions are not well taken. While the appellant stated to the jury that he did not hear the warning given by the conductor, he admitted that he had frequently ridden on local freight trains before, and knew that there was posted in them warnings similar to the one exhibited to the jury, headed in large capital letters. "Warning! Notice! Danger!" The objections to the instructions given by the court at the instance of the defendant company are fully covered by the instructions given on behalf of the plaintiff, and are substantially the same as those approved in the case of Railway Co. *v.* Farr, 70 Ark. 269, 68 S. W. 243. See Krumm *v.* St. Louis, I. M. & S. Ry. Co., 71 Ark. 593, 76 S. W. 1075.

Judgment affirmed.

OWENSBORO CITY R. CO. *v.* ROBERTSON.

(Court of Appeals of Kentucky, Oct. 16, 1907.)

[104 S. W. Rep. 707.]

Trial—Question for Jury—Sufficiency of Evidence.—Where there is any evidence to sustain an issue, the question is for the jury.

Damages—Personal Injury—Permanency—Question for Jury.—Where, in an action for personal injury, plaintiff testified that he had had headaches since the injury, that he had not had such headaches before, and that his thigh continued to pain him up to the time of the trial, three months after the injury, there was evidence of a permanent injury sufficient to submit the matter to the jury.

Appeal—Instructions—Harmless Error.—Where, in an action against a street railway company for injuries to a passenger, there was evidence of gross negligence in the management of the car, and the jury found such gross negligence, an instruction that, if they found that the company was guilty of gross negligence in the management of the car or in its construction or condition, exemplary damages might be allowed, was not prejudicial, though there was no evidence of negligence in the construction or condition of the car.

Damages—Personal Injuries—Excessive Damages.—A passenger on a street car in a collision with a train at a crossing received a cut in the top of his head, his arms, face, hip, and legs were bruised, and

his hands were punctured. He was dazed after the accident due to concussion of the brain. Held, that a verdict for $600 as compensatory damages was not excessive.

Same—Mental Suffering.*—One receiving a physical injury may recover not only for his physical suffering but for such mental suffering as he endured.

Appeal from Circuit Court, Daviess County.
"Not to be officially reported."

Action by R. P. Robertson against the Owensboro City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Miller & Todd, for appellant.
J. D. Atchison and *Eli H. Brown,* for appellee.

HOBSON, J. R. P. Robertson was a passenger on a street car of the Owensboro City Railway Company. He got on the car late in the afternoon for the purpose of going home. The line of the street railway crossed the track of the Illinois Central Railroad. As the car was crossing the railroad track, the railroad train backed into it, substantially demolishing it. There is some conflict in the evidence as to how this occurred. The evidence for the plaintiff is that the motorman was looking back in the car at a scuffle that was going on between two other employees of the company; that he neither stopped, looked, nor listened for the train; that his car was running at about 10 miles an hour; that the train was running at about the same speed, and as the car got upon the track it was struck by the train; that the bell of the train was ringing; and that the train was due and on time. The evidence of the motorman is that he saw the train, and stopped the car, but, thinking that the train was going away from the crossing, started up again, and when he discovered that the train was backing toward the crossing it was too late for him to stop the car. On the question of fact as to how the accident occurred the weight of the evidence is with the plaintiff. Robertson testified that he was on the platform of the car. That he did

*For the authorities in this series on the question whether there can be recovery, in an action for personal injuries, for the physical and mental suffering of the injured person, see foot-notes appended to Waller *v.* Wilmington City Ry. Co. (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to McDermott *v.* Severe (U. S.), 21 R. R. R. 628, 44 Am. & Eng. R. Cas., N. S., 628 (mental suffering); Sappington *v.* Atlanta, etc., R. Co. (Ga.), 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846 (mental suffering); foot-notes appended to Bahr *v.* Northern Pac. Ry. Co. (Minn.), 24 R. R. R. 782, 47 Am. & Eng. R. Cas., N. S., 782 (mental suffering); foot-notes appended to Lindsay *v.* Oregon Short Line R. Co. (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 616 (mental suffering); foot-notes appended to Chicago Con. Traction Co. *v.* Schritter (Ill.), 24 R. R. R. 442, 47 Am. & Eng. R. Cas., N. S., 442.

not notice the train, and knew nothing of its striking the car until he was hanging by his leg to the platform of the rear coach of the train with his head down. He had been unconscious and did not know how he got in that position. That he had been carried about 150 feet from the crossing along the railroad track. He testified that he had a cut on the top of his head about three inches long; that his arms, face, and legs were bruised up; that his hand had two punctures in it; that he thought at the time that the arm and leg were broken; that the arm was the most painful hurt he had; that his hip was bruised; that he had a cut place on his leg; and that the hip joint was very sore and was still painful at the trial. He also testified that on the following Friday he went to the doctor's office and had him to treat his wounds—that is, that he was well enough to go down town for this purpose—and he had been attending to his business ever since; that he had had trouble with his hip and pains in his head such as he had never had before. Two doctors were introduced on the trial. They concurred in the description of the wound in the head as being only a flesh wound, that there were no bones broken, and that they did not think he was permanetly injured. The proof by one of the witnesses sustains Robertson's statement that he was out of his head or dazed after the accident, and this the doctors agree was due to concussion of the brain. The accident occurred on the 31st of March. The trial was had on June 20th. The court instructed the jury that they should find for the plaintiff compensation for his injuries; ordinary negligence being confessed in the answer of the defendant. He also instructed the jury that, if the defendant was guilty of reckless or wanton negligence or carelessness, they might allow exemplary damages. The jury allowed $600 as compensatory damages and $400 as exemplary or punitive damages, making in all $1,000, for which the court entered judgment, and the railway company appeals.

It is insisted for the plaintiff that the court erred in telling the jury that if they believed from the evidence that the plaintiff's injuries were permanent they should allow him such a sum for his permanent injuries as they reduced his power to earn money, for the reason that the evidence did not show that he had sustained any permanent injuries. The rule is, if there is any evidence, the question is for the jury. The plaintiff testified that he had had headaches since he was hurt, and that this continued up to the trial; that he had not had such headaches before; and that his thigh continued to hurt him at the trial. While these symptoms were not conclusive of permanent injury, they were some evidence that there might be a permanent injury, and therefore it was not improper to submit the question to the jury. The defendant also complains that the court told the jury that they might allow punitive damages if the defendant was grossly

negligent in the management of its street car or in its construction or condition, for the reason that there was no evidence that there was any defect in the car. We do not find anything in the evidence to show that there was any negligence except that of the motorman; but the real question in the case was whether the accident happened as he said, or as described by the other witnesses. If it happened as they said, there was certainly gross negligence on his part. The verdict of the jury shows that they credited this version of the occurrence. This being the question before the jury, the use of the words we have referred to in the instructions could have had no effect on the result of the case. If they had been omitted it could have had no effect on the verdict. While the verdict of the jury is large for the injury shown by plaintiff, we cannot say that it is so large as to indicate passion or prejudice on the part of the jury. The plaintiff received a physical injury, and he may recover compensation not only for his physical suffering, but for such mental suffering as he endured. On the whole record, we find no substantial error to the prejudice of appellant.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* TAYLOR.

(Supreme Court of Arkansas, July 8, 1907.)

[104 S. W. Rep. 551.]

Damages—Grounds—Mental Suffering.*—Under the rule that mental suffering alone, without physical injury or other elements of damages, cannot be made the subject of an independent action for damages, even where the act or violation of duty complained of was willfully committed, and that such suffering is merely an aggravation of damages when it naturally ensues from the act complained of, a railroad is not liable for damages to a passenger for mental suffering caused by mere verbal abuse of the station agent.

Wood and Riddick, JJ., dissenting.

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Action by W. L. Taylor against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action instituted by W. L. Taylor against the St. Louis, Iron Mountain & Southern Railway Company to recover damages alleged to have been sustained by the plaintiff on account

*See preceding case, and foot-note.

of the willful and wrongful act of a servant of the defendant. The facts relied on by the plaintiff to sustain a recovery are substantially as follows: The plaintiff was a traveling salesman for a wholesale dry goods firm, and carried on his trip a number of sample trunks, weighing in the aggregate more than the amount allowed free to passengers. He made a trip to Judsonia, Ark., a station on the line of defendant's railroad, in the course of his business, and when he was ready to depart from the town on defendant's train he got into a controversy with defendant's station agent at that place concerning the weighing and checking of his baggage. The agent at first refused to check the baggage because the time was short before the arrival of the train, and, when the plaintiff threatened to report him, he told plaintiff to "report and be damned," called him a "thief," "a dirty cur," and other vile names, and, after the plaintiff struck him with an umbrella, picked up a gun in a threatening attitude toward plaintiff. He made no attempt, however, to shoot, and the plaintiff sustained no physical injuries in the encounter. The agent afterwards checked the baggage, and the plaintiff departed with his baggage on the train he had intended to take. The only kinds of injury set forth in the complaint, or which the testimony tends to show, are mental anguish and humiliation resulting from the insulting remarks made by the station agent. The court gave the following, among other, instructions, over the objections of the defendant: "If the jury believe from the evidence that the plaintiff went to the depot of defendant company for the purpose of taking passage on its train, and at the time he had a mileage ticket for his passage and an excess baggage ticket, and exhibited the same to the agent, Ford, then he was entitled to all the privileges and protection of a passenger, and it was the duty of the defendant company, through its agent, Ford, to treat him civilly, politely, and if you believe from the testimony that, when the plaintiff went to the depot, he had a mileage ticket and excess baggage ticket, and presented the same to the agent, and that he intended to take passage on the defendant's train, and the agent, Ford, treated him in an insulting manner, by imputing to him dishonest conduct, and otherwise willfully, wantonly, or maliciously insulted or assaulted him, then the plaintiff is entitled to recover, and in arriving at damages to which he is entitled you should allow him a fair pecuniary compensation for such damages as were the direct consequences of the act complained of, for any mental excitement, anguish of mind, sense of shame and humiliation, if any, which he may have suffered by reason of the wrongful conduct of the agent, Ford." The court also refused to instruct the jury, as requested by the defendant, that there could be no recovery for mental anguish, shame, and humiliation resulting from the insults offered. Plaintiff recovered judgment

below for the sum of $4,500 damages, and the defendant appealed.

T. M. Mehaffy and *J. E. Williams,* for appellant.
J. W. & M. House, for appellee.

MCCULLOCH, J. (after stating the facts as above). Many questions are presented in the record for our consideration, but the controlling one, for the purpose of disposing of this case here, is whether or not the plaintiff is entitled, under the circumstances shown in the case, to recover damages for mental anguish and humiliation, unaccompanied by physical injury. The evidence shows sufficiently to warrant a finding that the station agent of the railway company, while the plaintiff was in the station for the purpose of having his baggage checked preparatory to taking passage on the train, and while he was conferring with said agent concerning the checking of his baggage, willfully and without provocation insulted him by the use of profane, threatening and defamatory language. We do not determine whether the plaintiff should be held, under the circumstances, to be a passenger in the sense that the railway company owed him the same duty of protection from willful acts of its servants that it owes to passengers on trains. We prefer to dispose of the questions of the defendant's liability for the mental suffering and humiliation as elements of damages, disconnected from any physical injury, on the broader ground, treating the plaintiff, for the purpose of testing this question, as a passenger in the most complete sense.

The precise question involved has never been determined by this court. In Railway *v.* Wilson, 70 Ark. 136, 66 S. W. 661, the question was mentioned, but expressly reserved for decision; the court saying: "It is certain there could be no recovery for mental anguish unaccompanied by personal injury, where there was no willful, wanton, or malicious wrong done. Whether there could be recovery for mental suffering alone we reserve for decision." In the Peay Case, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463, the court held with respect to the liability of a telegraph company for negligent failure to promptly transmit and deliver a message that there could be no recovery for mental anguish independent of and disconnected from a physical injury. And in Davis *v.* Richardson, 76 Ark. 348, 89 S. W. 318, we held that there could be no recovery of damages by a female from an individual for mental anguish on account of an indecent proposal made to her. The court said in the opinion that mental suffering and humiliation are not elements of damages, citing the Peay Case. In Railway Co. *v.* Anderson, 67 Ark. 123, 53 S. W. 673, the court held that in an action by a passenger to recover damages for being wrongfully carried beyond her destination, where no physical injury resulted or other loss or injury except mental

anxiety and suffering, there could be no recovery for the mental suffering. In that case there were no facts or circumstances indicating malice or willfulness, and no insult offered to the plaintiff, but the mental suffering was claimed to have resulted from the anxiety on account of the delay in getting back to her destination, and in being compelled, during the period of the delay, to remain in the company of a crowd of partially intoxicated, boisterous, and profane passengers. So we see that it has been decided by the court that a corporation is not liable for mental suffering unaccompanied by physical injury, inflicted by the negligence of its servants in the performance of a contract, there being no element of willfulness in the commission of the negligent act complained of, and that an individual is not liable for the wrongful infliction of mental suffering, unaccompanied by physical injury, even where there is the element of willfulness in the commission of the act complained of.

It only remains, therefore, to decide whether a railway corporation is liable for such mental suffering and humiliation unaccompanied by any physical injury inflicted upon passengers by the wrongful act of one of its servants willfully committed. The questions already decided by this court, as above stated, are sought to be distinguished from the facts of this case on two points, viz.: First, that the act complained of was committed by a servant of the railway company in violation of the contractual duty which the carrier owed to its passengers to afford them protection from either the negligent or willfully wrongful acts of its servants; and, second, that the injury resulted from the willful acts of the servant of the carrier. We do not think that the distinctions are sound. It is true that a carrier owes to its passengers the absolute duty of protection against either the negligence or willfulness of its servants. Railway *v.* Dowgiallo (Ark.) 101 S. W. 412, and authorities cited. But the carrier in such case can be required to respond only in such damages as the law takes heed of as proper elements of damages. If mental suffering and humiliation, unaccompanied by any physical injury, are not accounted in law as elements of damages in other cases, we see no reason why they should be made so in testing the liability of a carrier for the wrongful acts of its servants. While, as has been said, the carrier is liable to the passenger for all proper damages resulting from negligent or willful acts of its servants, yet mental suffering independent of physicial injury is not specially made an element of damages applicable in that kind of case. It is not becuase the carrier is not liable for the willful acts of its servants that it escapes responsibility for such injury, but because the character of the injury is not such that the law affords compensation for. The reason that mental suffering unaccompanied by physical injury is not considered as an element of recoverable damages is that it is deemed to be too remote, uncer-

tain, and difficult of ascertainment; and the reason that such suffering is allowed as an element of damages, when accompanied by physical injury, is that the two are so intimately connected that both must be considered because of the difficulty in separating them. 4 Sutherland on Damages, § 1245; Fell *v.* Coal Mining Co., 23 Mo. App. 216; Chapman *v.* Telegraph Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; Johnson *v.* Wells Fargo Co., 6 Nev. 224, 3 Am. Rep. 245; Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303; Ewing *v.* Pittsburg, etc., Ry. Co., 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709. "So far as mental suffering originating in physical injury is concerned," says Judge Lumpkin in the Georgia case cited above, "it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So in case of physcial injury, the mental suffering is taken into view. But, according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered." "Mental anguish, of itself, it is said, has never been treated as an independent ground of damages so as to enable a person to maintain an action for that injury alone; neither has insult nor contumely." Wood's Mayne on Damages, p. 75. And it was said in an English case many years ago that "mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone." Lynch *v.* Knight, 9 H. L. 577. Mr. Sutherland says that: "Mental suffering alone, unconnected with any other legal wrong, will not, according to the great weight of authority, support an action. It is only when some act is done which will constitute a cause of action that such suffering can be considered. This is not a cause of action, but an aggravation of damages, when it naturally ensues from the act complained of." 4 Sutherland on Damages, § 1245.

The authorities are by no means harmonious on this question, and we confess that there are many cases holding contrary to the views we express. Most of them, however, are cases decided in states where the courts are fully committed to the doctrine of allowing recovery for mental suffering unaccompanied by physical injury. Some of the authorities, though, holding to the contrary doctrine, are in states where the courts had previously refused to allow such an element of recovery in telegraph cases. These cases are found in the states of Georgia, New York, and Missouri. Cole *v.* Atlanta & West Point Ry. Co., 102 Ga. 474, 31 S. E. 107; Gillespie *v.* Brooklyn Heights Ry. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; Smith *v.* Atchison, P. & S. Ry. Co., 122 Mo. App. 85, 97 S. W. 1007. We are unable to harmonize the doctrine of these cases

with the former holdings of the same court, that there could be no recovery for such an element of damages against a public service corporation for a breach of its contracts, nor is the reasoning of the above cited cases reconciable with each other. We fail entirely to see how a distinction can be founded upon the mere fact that the injury results from the willful act of the servants of the corporation or from a willful breach of its contract. If the infliction of mental suffering alone can be made the subject of an action to recover damages in any case, we cannot see why such recovery should not be allowed, even though it is inflicted by mere negligence, and not by a willful act. As this court has already held in the Peay Case that a negligent act resulting in mental suffering only cannot be made the subject of an independent action for damages, we think that the only logical result of that holding is to say that such damages cannot be recovered merely because there is an element of willfulness in the commission of the act complained of.

When this court reached the conclusion in the one case that the corporation could not be required to respond in damages for mental anguish alone on account of the negligent act of its employees, and in the other case that an individual could not be made to respond in damages for mental suffering alone on account of willful act, we think that it established a doctrine that necessarily precludes recovery in this case. We prefer to adhere to the rule, as a sound one, that mental suffering alone, unaccompanied with physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages, even where the act or violation of duty complained of was willfully committed; and that such suffering does not of itself constitute a cause of action, but is merely "an aggravation of damages when it naturally ensues from the act complained of."

There is no evidence tending to show that the plaintiff sustained any injury at all, except mental anguish and sense of shame and humiliation on account of the insulting language used toward him by the station agent; but the instruction of the court permitted the jury to find a verdict in favor of the plaintiff based entirely upon those elements of damages resulting from the insulting language used as an independent ground of action.

Reversed and remanded.

WOOD and RIDDICK, JJ., dissent.

ST. LOUIS, I. M. & S. RY. CO. *v.* LEAMONS.

(Supreme Court of Arkansas, April 29, 1907.)

[102 S. W. Rep. 363.]

Carriers—Injuries to Passengers—Questions for Jury.*—In an action by a passenger for personal injury alleged to have been sustained in getting off a moving train under the direction of the train porter, the questions of negligence and contributory negligence are for the jury to determine under proper instructions.

Same—Sufficiency of Evidence—Negligence of Defendant.—In an action by a passenger for personal injuries sustained in getting off a moving train, evidence considered, and held sufficient to sustain the special finding of the jury that defendant was negligent in telling plaintiff to get off the train, and that defendant caused plaintiff to take the jump.

Same—Instructions.—In an action by a passenger for personal injuries sustained in jumping off a moving train under the direction of defendant's porter, an instruction that "carriers of passengers by steam are held to the highest degree of care, and are responsible for the smallest negligence to such passengers," is not reversible error, where the other instructions made clear the predicate for the cause of action, and under the instructions, as a whole, the jury could not have taken the instruction as referring to the conduct of the porter.

Damages—Instructions.—In an action for personal injuries, it is error to authorize a recovery for the expenses of medical treatment where there is no evidence of the amount of such expenses.

Appeal—Review—Correction of Error—Remitting Part of Verdict.—The action of the lower court in permitting a judgment for plaintiff in a personal injury action to stand after $100 was deducted therefrom, on the theory that the remittance would correct the mistake in giving an instruction authorizing recovery for medical expenses, in the absence of proof of the amount of such expenses, will not be held error.

Damages—Personal Injuries—Impairment of Earning Capacity—Sufficiency of Evidence—Question for Jury.—In a personal injury action, evidence considered, and held to take the question of decreased earning capacity to the jury.

*For the authorities in this series on the question whether it is contributory negligence in a passenger to alight from a moving train or car, see foot-notes appended to Louisville & N. R. Co. (Ky.), 22 R. R. R. 830, 43 Am. & Eng. R. Cas., N. S., 830; Burke *v.* Bay City Traction & Elev. Co. (Mich.), 22 R. R. R. 758, 45 Am. & Eng. R. Cas., N. S., 758; foot-notes appended to United Rys. & Elec. Co. *v.* Weir (Md.), 22 R. R. R. 472, 45 Am. & Eng. R. Cas., N. S., 472; foot-notes appended to Sweet *v.* Birmingham Ry. & Elec. Co. (Ala.), 22 R. R. R. 468, 45 Am. & Eng. R. Cas., N. S., 468.

Same—Excessive Damages.—In an action for personal injuries, where the evidence shows a serious injury to plaintiff's face and great pain; that a bone was driven in against his ears so as to cause partial deafness; that he was suffering pain some two years afterwards; that his face was disfigured for some time at least; and that he had incurred some expense and was unable to do work as he had before—a judgment for $2,400 is not excessive.

Same—Mental Pain.†—In a personal injury action, where the evidence proved serious injury, great pain, and the fear of death for many days, also that plaintiff was disfigured in the face for a time, and that two years afterwards he still suffered pain, there was no error in including the element of mental pain in an instruction on the subject of damages.

Battle and Wood, JJ., dissenting.

Appeal from Circuit Court, Union County; Chas. W. Smith, Judge.

Action by W. D. Leamons against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff defendant appeals. Affirmed.

According to plaintiff's testimony, he bought a ticket from Palestine, Tex., to El Dorado, Ark., by the way of Gurdon, a junction, got to Gurdon early in the morning, and had to change cars there and wait until the train came from the north. The trains going to Texarkana and El Dorado head the same way at the depot for about half a mile. When a train came in from the north, he walked up to it, and was asked by a negro, who was assisting people on the train, as to his destination. After being told that it was El Dorado, he took plaintiff by the arm and assisted him on the train. Plaintiff took a seat, and as the train was moving on, the man came in and asked if plaintiff was the gentleman he told this was the El Dorado train. On being answered in the affirmative, he said that he had made a mistake; that the train went to Texarkana. Plaintiff then got up and walked to the steps of the vestibule, but found it closed, and turned to go back, when he met the negro coming in a trot, who came and opened the door and told him to make haste and get off. As he got off, he fell on some coal and cut his face, breaking his cheek bone, skinning and cutting his nose and bruising his shoulder. He was thrown by the motion of the cars, and the injury was caused by his falling on the coal. On cross-examination the plaintiff testified that he knew the train was moving

†See foot-notes appended to Baker *v.* Northern Pac. Ry. Co. (Minn.), 24 R. R. R. 782, 47 Am. & Eng. R. Cas., N. S., 782; foot-notes appended to Lindsay *v.* Oregon Short Line R. Co. (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 616; foot-notes appended to Chicago Con. Traction Co. (Ill.), 24 R. R. R. 442, 47 Am. & Eng. R. Cas., N. S., 442.

when he jumped and fell; that he saw the conductor, but did not speak to him nor ask him to stop the train; that he spoke to no one except the porter and requested no one to have the train stopped; that he did not know how far he had gone down the road when he jumped off; that he did not know that the porter gave the signal for the train to stop before he jumped; that he supposed the signal was given after he jumped; that there had been none given before he jumped off; that he could have heard it, if it had been given; that the train stopped immediately after he jumped and within 200 or 300 yards after the coach passed him. The testimony of several witnesses for the defendant indicated that the signal to stop had been given before the plaintiff jumped, and the engineer testified that, after applying the brakes, he looked out of the windows and saw the plaintiff jump; that the train was already slowing up and coming to a stop when he jumped. The jury by special verdict found that the defendant was negligent in urging plaintiff to take the leap and that it was the cause of plaintiff's taking the jump, and that plaintiff was not guilty of contributory negligence in jumping. There was a verdict for $2,500, from which plaintiff remitted $100. Other facts are shown in the opinion.

Tom M. Mehaffy, for appellant.
R. G. Harper and *Thornton & Thornton,* for appellee.

HILL, C. J. The reporter will state the facts of the case.

1. Suffice it to say that this was an action for personal injury received in getting off a moving train, where it is claimed that the passenger got off under the directions of the train porter, and in reliance of his superior knowledge of the safety of the act. The question of negligence and contributory negligence was properly submitted to the jury. It has frequently been held by this court that in cases like this the question is one to be determined by the jury under proper instructions. Railway *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Railway *v.* Atkins, 46 Ark. 423; Railway *v.* Baker, 67 Ark. 531, 55 S. W. 941. There were special findings of the jury which settled the question of negligence and contributory negligence, and there was evidence sustaining those findings.

2. The second instruction, which is a general statement that "carriers of passengers by steam are held to the highest degree of care, and are responsible for the smallest negligence to such passengers," is criticised as being inapplicable to the facts. The court is unable to see where a general statement of this kind could be misleading to a jury, and it is not thought that under the instructions as a whole the jury could have taken this one as referring to the conduct of the porter of the train, and that

he was held to the highest degree of care in advising appellant to jump, and that any slight negligence on his part would be sufficient upon which to base a cause of action, as the court in other instructions made clear the predicate for the cause of action.

3. Other criticisms of the instructions have been considered; but the instructions as a whole fairly present the law. Among the elements of recovery the jury are told that they might consider "any debts he may have incurred or paid out by attempting a cure, as well as any losses he may have sustained, by reason of a loss of his earning capacity on account of said wound." The evidence showed that appellee was under the care of a doctor at Gurdon, who dressed his face and sewed it up, and after he got home he was at some expense there; but the amount of his expenses at either place is not shown. After the verdict appellee remitted $100 on account of the failure of the proof to show the amount of these items. It was error to enumerate the items of expense as something recoverable, unless there was evidence thereof. But the evidence here shows that there was necessarily some expense incurred in dressing appellee's face and sewing it up at Gurdon, and some expense at home. It seems reasonable that $100 should have covered such items. At least, the court cannot say that the circuit court erred in allowing the judgment to stand after the $100 was deducted therefrom on the theory that it would correct the error in allowing the question to go to the jury without the evidence being explicit as to the amount of such expenses. As to the last element, of loss sustained by reason of decrease in earning capacity on account of the wound, the evidence is meager, yet it is sufficient for this element to be enumerated in the charge. The evidence shows a serious injury to appellee's face, that the bone was driven in against the ear, which caused partial deafness. He was asked: "What effect, if any, has that had upon your capacity to labor and perform your ordinary avocation?" He answered: "I suppose a right smart. I have not been able to do work since like I did before." There is nothing to show what he did before nor his earnings; but, taking the evidence as a whole and his physical condition, there was enough for the jury to consider a decrease in his earning capacity from the time of the accident to the time of the verdict. The verdict is moderate in view of the seriousness of the injury and the great pain attending it for so long a period.

4. The instruction is also criticised as containing an element for mental pain and anguish. The evidence shows a very serious injury, great pain, and for many days the fear of death was upon appellee by reason of his injuries; and he was still suffering pain some two years thereafter. It is not clear from this record whether he was permanently disfigured in his face. Certainly

he was disfigured for a time. There was no error in including the element of mental pain in the charge.

On the whole cause, the court is unable to find any reversible error, and the case is affirmed.

BATTLE and WOOD, JJ., dissent.

PURVIS *v.* BUFFALO, R. & P. R. Co.

(Supreme Court of Pennsylvania, Nov. 14, 1907.)

[68 Atl. Rep. 189.]

Carriers—Person Leaving Train—Contributory Negligence.*—Where a person goes on a train at a station with the permission of the trainmen to locate his family in a sleeper, and as he starts to leave the car, while the train was moving, the brakeman tells him to hurry up, and he is thrown under the moving car and is injured, he is guilty of contributory negligence.

Appeal from Court of Common Pleas, Butler County.

Action by L. O. Purvis against the Buffalo, Rochester & Pittsburg Railroad Company. Judgment for defendant. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

The court entered a compulsory nonsuit, which it subsequently refused to take off; Galbreath, P. J., filing the following opinion:

"A careful re-examination of this case on the pending motion has not convinced us that error was committed in directing a compulsory nonsuit. On the night of July 11, 1905, near midnight, at Butler, plaintiff entered a Pullman coach comprising part of a train which runs from Pittsburg, Pa., to Buffalo, N. Y., over defendant's road. The train is known as 'the Flyer' and has the reputation of being a fast train, which was known to the plaintiff. He entered the coach with his wife and daughter, whose destination was a point in Canada. He had secured a stateroom for them, and, by reason of the condition of his wife's health, was anxious to know that the quarters engaged were such as he had stipulated for and were suited to her condition. In order to be assured of this, as well as to assist his wife and daughter with their baggage, he entered the train with them, informing the brakeman as he was about to enter that he himself was not going away, but only his wife and daughter. Quite a number of others boarded the train at the Butler station. The plaintiff, his wife, and daughter entered the coach at the rear end, and walked the length of the car, about 76 feet, to the state-

*See preceding case, and foot-notes.

room, which was located at the front end of the coach. After seeing his wife and daughter safely located in their room, the suggestion was made to him by some one that the train was starting or about to start, and that he had better get off, which he proceeded to do. The plaintiff testifies as follows: 'Well, Mrs. Purvis, when I said that I guessed everything is all right, she says, "Now hurry and get off;" and Mr. Haworth says, "Yes, I guess the train is in motion," and the conductor was standing right alongside of me.' The aisle of the car was impeded by others who had entered with their baggage, and who were in the act of getting located in their berths, which necessarily retarded somewhat the plaintiff's progress to the rear of the car, where he had entered. On his way down the aisle some one suggested to him that he had better hurry, as the train was moving. As he approached the rear enterance, the brakeman opened the outside door of the coach and said to him, 'Hurry and get off.' The night was wet and dark, with little light on the platform. The plaintiff stepped to the platform, facing the direction in which the train was moving. As he jumped, a distance of about 20 inches, to the platform, the train, in quickening its motion gave a lurch, the plaintiff alighted on the platform, but his feet struck against something, and he slipped and fell under the car and was injured in the way testified to by him. The point on the platform where he alighted was about 145 feet from the point where he had entered, which was, therefore, the distance the train had already moved when plaintiff jumped from it.

"The plaintiff not being a passenger on defendant's train, ordinary care was the measure of defendant's duty toward him. Lucas *v.* New Bedford, etc., R. R. Co., 72 Mass. 64, 66 Am. Dec. 406. It would be difficult to say, we think, under the evidence, that the defendant company in any respect failed in the exercise of that measure of care toward him. The compulsory nonsuit was not, however, put upon that ground, but was directed because, under the evidence and the law applicable thereto, the plaintiff was deemed guilty of contributory negligence. The rule of law governing cases of this kind has been stated in many cases. As a general proposition, it is negligence in a passenger to jump from a moving train, but to this general rule there are rare exceptions, as when the passenger is placed in peril by the default or negligence of the company, or when he leaves the train while it is in motion by direction of the company's agents, it is for the jury to say, upon the evidence, whether the act was negligent or not. Penna. R. R. Co. *v.* Lyons, 129 Pa. 113, 18 Atl. 759, 15 Am. St. Rep. 701. A more recent statement of the general rule, which indicates that its strictness has not been in any degree relaxed, is found in Boulfrois *v.* Traction Co., 210 Pa. 263, 59 Atl. 1007, 105 Am. St. Rep. 809, wherein it is said 'that

to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it.'

"On part of plaintiff, it is contended that his case comes within one of the exceptions to the rule, by reason of the language of the brakeman who said to him, when he was about to get off the train, 'Hurry up and get off,' which, it is urged, was equivalent to a direction to him to get off. As tending to indicate what is regarded by the courts of our state as such a direction by the agents of the company as will take a case out of the general rule, two cases may be cited. The first of these is Deery v. Railroad Co., 163 Pa. 403, 30 Atl. 162, where a passenger riding in a combination car got off through the side door, with the help of the conductor standing on the ground outside, who extended his hand to help her alight, at the same time saying, 'Step lively, madam, step lively.' In so getting off she was injured, and in a suit against the company for damages was nonsuited. The action of the court was on writ of error affirmed, and, while the act of the plaintiff in alighting from the train at the side door was a prominent feature of the case, yet the Supreme Court in its opinion says: 'Neither the language of the conductor while she stood in the side door, nor the assistance he gave her in alighting, nor both combined, charged the company with responsibility for the consequences of her careless act. * * * In such case something more is required to render the company liable than its employee's consent to the passenger's negligent act.' In the case of Rothstein v. Railroad Co., 171 Pa. 620, 33 Atl. 379, the plaintiff, at Altoona, Pa., wishing to go to New York, by mistake boarded a train for Pittsburg. On discovering his mistake he said to an employee on the train, 'Stop, please, and let me off. I want to go to New York,' and received the reply, 'We cannot stop this train. Step over on your left side and jump off. We are going slow.' He jumped off, and in doing so was injured, and, having brought suit against the company, a compulsory nonsuit was entered. On appeal to the Supreme Court the action of the court below in refusing to take off the nonsuit was affirmed. The court says: 'The sole attempted extenuation of the act lies in the conversation with the person called by the plaintiff a trainman, but whether the person was the conductor of the train, a brakeman, or a Pullman car porter does not appear. It does appear, however, that he did not order the plaintiff to jump from the car, and that what he said ammounted at most to a suggestion or expression of opinion that he might do so.'

"In the first of these cases the plaintiff was acting on her own initiative in alighting at the side door of the car, but was helped by the conductor, and by him was bidden to make haste in the thing which she was about to do. This, however, did not relieve her of responsibility for her own voluntary act. In the case

of Rothstein *v.* Railroad Co., the suggestion that he jumped from the moving train did not originate with the plaintiff, but came from an employee of the defendant company. But neither the language of the conductor, in the one case, bidding the passenger to make haste, nor the suggestion of the trainman in the other, amounted to a direction to the passenger which would take the case out of the operation of the general rule. From these cases we may draw the conclusion that the direction which will excuse the act of a passenger in alighting from a moving train must be such as amounts to or is accompanied by a degree of constraint or compulsion. In the case at bar the plaintiff alighted from the moving train because it was his fixed purpose to do so. When asked the question on cross-examination, 'You intended to get off?' he answered, 'Certainly, that was what I was there for.' That he realized the danger of doing so is evident from his further testimony wherein he says: 'Yes, I remember when I was running down the aisle of thinking, "Now, I must be careful and get off towards the engine," and that is the way I jumped.' The language of the brakeman, 'Hurry up and get off,' did not impel the plaintiff to do so against his will. It did not even suggest to him that he jump off, but simply hastened him in doing that which he purposed doing in any event. It amounted to no more than an expression of opinion on part of the brakeman that he could get off the moving train if he did so quickly. No constraint was put upon plaintiff. He was not impelled to do that which he would not otherwise have done. The very fact, as testified to by plaintiff, that his own purpose was to alight from the train, negatives the idea of any outside constraint or direction. The language of the brakeman at most but suggested haste in that which plaintiff already purposed doing. But, as said in Deery *v.* Railroad Co., 163 Pa. 403, 39 Atl. 162: 'In such case something more is required to render the company liable than its employee's consent to the passenger's negligent act.' The brakeman's language was not responsible for the plaintiff's initiative, nor did it excuse the exercise of his own judgment.

"The motion to take off the compulsory nonsuit is therefore refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

T. C. Campbell, for appellant.

C. H. McCauley, F. J. Forquer, and *Lev. McQuistion,* for appellee.

PER CURIAM. This is a hard case, and appellant's counsel has presented a very able argument to take it out of the general rule that to get on or off a moving train is negligence per se.

We have re-examined the authorities to see if it can be brought within the exceptions, but it cannot consistently be done. The rule is founded on solid considerations of public policy for the safety of the traveling community, the exceptions are few in number, and the cases must come very clearly within them.

The learned judge below has discussed the law and the facts very fully and accurately, and, on his opinion, the judgment is affirmed.

ANDRUS *v.* COLUMBIA & OKANOGAN STEAMBOAT CO.

(Supreme Court of Washington, Oct. 19, 1907.)

[92 Pac. Rep. 128.]

Carriers—Carriage of Goods—Connecting Carriers—Place of Delivery.—A merchant ordered goods shipped to him over certain connecting lines. When the goods arrived at the last connecting point, the last connecting line had sold out its business to its sole competitor, which received the goods. Held, that the fact that the company had gone out of business did not render the shipment completed when it arrived at the last connecting point, but its successor had authority, and it was its duty, to forward the goods to their destination; there being no other company that could carry them.

Same—Connecting Carriers—Duty to Accept Freight.—Carriers must accept freight tendered by another carrier.

Same—Connecting Carriers Agents of Consignor.—A consignor of goods to be carried over successive routes makes each successive carrier his forwarding agent.

Same—Lien for Freight—Rights of Connecting Carriers.*—The last of several connecting carriers has a lien for freight which he has paid to successive carriers, even when the goods have been forwarded over the wrong line and to the wrong place.

Appeal from Superior Court, Chelan County; R. S. Steiner, Judge.

Action by Charles A. Andrus, sole survivor of the Charles A. Andrus Company, against the Columbia & Okanogan Steamboat Company. From a judgment for plaintiff, defendant appeals. Reversed.

Douglas, Lane & Douglas, for appellant.
Arthur P. Redman, for respondent.

DUNBAR, J. This is an action brought by the plaintiff as the

*See extensive note, 22 R. R. R. 247, 45 Am. & Eng. R. Cas., N. S., 247.

sole surviving member of the Charles A. Andrus Company, a copartnership, to recover for the alleged conversion of a car load of powder shipped to the said company from Black River, Wash. The case was tried upon an agreed statement of facts. The facts are, in substance, as follows: That Charles A. Andrus and J. M. Hagerty were, at the time of the matters complained of, copartners engaged in a general mercantile business at Nighthawk, Okanogan county, Wash.; that the defendant was a corporation duly created and existing under and by virtue of the laws of the state of Washington, etc., and was a common carrier of goods operating a line of steamboats upon the Columbia and Okanogan rivers, and between Wenatchee, Brewster, and Riverside, on said rivers, and within the state of Washington; that at the time when the North Star Transportation Company sold its only boat to the defendant, said company was a corporation duly organized, etc.; that on the 15th day of April, 1903, J. M. Hagerty, one of the members of the firm of Charles A. Andrus Company, gave the freight agent of the Great Northern Railway Company at Wenatchee certain shipping instruction in writing, marked "Exhibit A," and said instructions were never revoked during the time of the matters complained of, which instructions were not known to the defendant; that on the 2d day of June, 1903, J. J. O'Connor, manager of the North Star Transportation Company, gave certain shipping instructions to A. A. Piper, freight agent of the Great Northern Railway Company at Wenatchee, marked "Exhibit B," which will hereafter be noticed, said instructions being given without authority of either Andrus or Hagerty, except such implied authority as might arise from the relations of the parties, that on the 2d day of June, 1903, the North Star Transportation Company ceased to do business as a common carrier, and sold its only boat to the defendant; that since said time the defendant has been the only common carrier operating on the Columbia river between Wenatchee and Riverside, Wash.; that on or about June 5, 1903, the Charles A. Andrus Company ordered 600 boxes of powder from Schwabacher Hardware Company of Seattle, Wash., with instructions to ship the same to Charles A. Andrus Company in care of the North Star Transportation Company, at Wenatchee, Wash.; that said order was accepted when given; that said Schwabacher Hardware Company agreed to sell and ship the said goods as requested, said instructions not being known to defendant; that on or about June 2, 1903, said Schwabacher Hardware Company, in execution of such order, shipped said powder from Black river, Wash., by delivering the same to the Columbia & Puget Sound Railroad at that place, said powder occupying an entire car; that at said Black river said railroad had no freight agent at the time this shipment was made; that no bill of lading or other instrument was ever given by said railroad for this shipment; that on the

arrival of said car at Seattle it was delivered to the Great Northern railway, by which railroad it was billed as set out in the tag, and transported to Wenatchee, Wash., where the said car arrived about June 27, 1903; that upon the arrival of said powder at Wenatchee, Wash., there were certain freight and cartage charges due; that said powder was delivered by the Great Northern Railway to the defendant; that said defendant paid said sum and took the powder, but without the knowledge or consent of said Andrus or Hagerty, and transported the same to Riverside; that the said powder has never been returned to the possession of the Charles A. Andrus Company, or to the said Andrus or Hagerty, but was held for advance charges, transportation, and wharfage, and sold to satisfy the same, said sale not being relied upon as a conversion in this action; that the said powder was delivered to the defendant by said A. A. Piper; that Riverside is the head of navigation on the Columbia river and is 40 miles distant from Nighthawk, Wash.; that there was at said time no telegraphic communication between Wenatchee, Wash., and Nighthawk, Wash., and the nearest telephone station was Loomis, Wash., a distance of 12 miles from Nighthawk, Wash., between which points a stage ran every day; that during all the time of the matters complained of Charles A. Andrus Company had an arrangement with the North Star Transportation Company by which said company was to carry all its freight at a fixed rate to the nearest practicable point to Nighthawk, Wash., to wit, Brewster or Riverside; that during all of said times the said Charles A. Andrus Company was doing business at Nighthawk, Wash., and had no place of business at Wenatchee, Wash., and the final destination of said powder was intended to be Nighthawk, Wash.; that the defendant knew where the Andrus Company's place of business was. It is further agreed that this statement of facts shall not be construed strictly, but that any fair inference from the above facts may be drawn by the court; it being the intention of the parties to submit to the court the question of whether or not, under the foregoing statement of facts, the defendant converted said powder at Wenatchee, Wash., at or about the time mentioned in the complaint.

The Exhibit A., referred to above, was as follows: "Wenatchee, Washington, April 15, 1903. To the agent of the Great Northern R. R., Wenatchee, Wash.—Dear Sir: You will please deliver all freight consigned to J. M. Hagerty whether billed to Wenatchee, Loomis, or Brewster to the North Star Transportation Co. J. M. Hagerty. * * * You will also deliver all freight consigned to 'The Chas. A. Andrus Co.' to the North Star Transportation Co. The Chas A. Andrus Co., per J. M. Hagerty, Pres." Exhibit B is as follows: "Great Northern Railway Line. Wenatchee, Wash. Station, June 2d, 1903. To A. A. Piper, Agent Great Northern Ry., Wenatchee, Wash.

—Dear Sir: The steamer North Star having been purchased by the Columbia & Okanogan Steamboat Company and from this date will be operated by them, this will be your authority to deliver to the Columbia & Okanogan Steamboat Company at Wenatchee, any and all freight consigned to or routed via, Steamer North Star or North Star Transportation Co. [Signed] North Star T. Co., per J. J. O'Connor, Mgr."

Upon this statement of facts, the court found as conclusions of law: (1) That upon the shipment of the powder from Black river said powder became the property of the Charles A. Andrus Company. (2) That upon the arrival of said powder at Wenatchee the shipment thereof, as directed by said Charles A. Andrus Company, through their agents, the Schwabacher Hardware Company, was completed; the shipping directions having been fulfilled and executed. (3) That the North Star Transportation Company was the special agent of the Charles A. Andrus Company for the purpose of transporting to Brewster and Riverside by its own boat goods destined for said Charles A. Andrus Company, and that said North Star Transportation Company had no authority, either from the Charles A. Andrus Company or by virtue of the circumstances, to enter into a new contract of affreightment with the defendant. (4) That the taking and carrying of said powder by the defendant from Wenatchee to Riverside was unauthorized, and by virtue of said taking and carrying and claiming a lien thereof for said carriage the defendant became guilty of a conversion thereof. And judgment was entered in favor of plaintiff for the amount claimed.

We think, under the statement agreed upon, that the court erred in its second conclusion of law, and that the shipping of the powder was not completed when it reached Wenatchee, for it can be gathered from all the agreed statement that it was the intention to authorize the transportation company to ship the goods to the nearest point to Nighthawk, viz., either Brewster or Riverside. In fact, paragraph 17 of the agreed statement of facts especially asserts that the plaintiffs had no place of business at Wenatchee; that the final destination of said powder was intended to be Nighthawk, Wash.

We think also the court erred in concluding that the North Star Transportation Company had no authority, either from the Charles A. Andrus Company or by virtue of the circumstances, to enter into a new contract for the freight with the defendant. Under the circumstances of this case, there being no other transportation company that could carry the goods which the Charles A. Andrus Company had contracted for and which it was its intention and desire to have shipped to them at Riverside, the agent of said company, the North Star Transportation Company, not only had authority, but it was its duty, to forward the goods to their destination over the best possible route, and there was no

other route and no other carrier by which they could be sent. If it did have authority, or if the Great Northern Raiload Company by reason of the authority conferred upon it by the agent of the Andrus Company, viz., the North Star Company, delivered the goods to the defendant for the purpose of transportation in accordance with the original intention of the consignor and its agent, there was no conversion of the property. It is established law, made necessary from the character of the business, that it is the duty of common carriers to accept freight tendered by another common carrier, and that a consignor of goods to be carried over successive routes makes the first and each successive carrier his forwarding agent. This is from the necessities of the case. The consignors cannot practically travel with the goods which are shipped, and there must be some one who is responsible for transactions in regard to their shipment over the different routes. Each succeeding carrier who takes charge of the goods is responsible for the goods, and therefore becomes an agent of the consignor for the goods. It is equally well established that the last carrier has a lien for freight which he has paid to successive carriers, and this lien is maintained even when goods have been forwarded over the wrong line and to the wrong place. "But where, on the other hand, the owner of goods has clothed another with apparent authority to deal for him with reference to the goods, and the carrier receives the goods for such person, it is held that he is entitled to his lien. This question has most frequently arisen in cases where the last of two or more connecting carriers claim a lien upon the goods, which is disputed on the ground that the delivery to him for carriage was unauthorized. [It will be seen that that is the claim made in this case.] As has been seen, where goods are delivered to a carrier for transportation beyond his own line, he has implied authority, in the absence of an apparent limitation, to send them forward by the usual route or by any customary and proper route, and, where he does so, the succeeding carrier, having no notice of any limitation upon the first carrier's authority, is not to be deprived of his lien because the first carrier, by mistake or otherwise, sends the goods to the wrong place or by the wrong route." Hutchinson on Carriers (3d Ed.) § 885. The same author, on page 105, says: "The delivery to the carrier or his agent may be made not only by the shipper in person, but also by his authorized agent. Where the owner of goods places them in the hands of an agent to secure their transportation by a carrier, the latter, in the absence of a known limitation upon the agent's authority, is justified in considering the agent authorized to exercise all the powers necessary to effect the purpose of the agency, and the acts of the agent in that respect will be binding upon the principal, as in giving directions as to the time or manner of shipment or the terms and conditions upon which the transpor-

tation is to be undertaken." Again, on page 147: "When goods are delivered to the carrier for the purpose of being carried to a point beyond the terminus of its route, and for that purpose to be delivered by him to a connecting carrier in order to continue the carriage, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line or succession of carriers, the first and each succeeding carrier becomes the agent of the owner to make delivery to the next carrier; and it is incumbent upon him to do so not only to relieve himself from further liability, but because it is a duty which he owes to the owner, and which he has assumed with the acceptance of the goods."

These questions were discussed by this court in Moses *v.* Port Townsend, etc., R. Co., 5 Wash. 595, 32 Pac. 488. It was there held that, where goods were delivered to a carrier for shipment to a destination beyond the route of the carrier, the freight being prepaid, such carrier became the forwarding agent of the owner, and succeeding carriers, to whom the goods were delivered by the first carrier, were not bound by the contract between the owner and the first carrier for freight charges of which they had no knowledge. This was a stronger case against the contention of the respondent than the case at bar, for there is no question in this case under the agreed statement of facts that the rates of shipment by the defendant in this case were any greater than they would have been by the North Star Company. In fact, it must be presumed from the agreed statement of facts that the rate was the same. In that case it was said: "When a consignor delivers goods to a carrier to be carried over successive routes of the first carrier, he makes the first carrier his forwarding agent, and the first carrier, who receives the goods and directs them over the route of the succeeding carrier, is the owner's agent, and the succeeding carriers act under the authority of the owner, and this has ordinarily been held to be the rule even though the first carrier did not follow the instructions of the shipper, where the succeeding carriers acted innocently"—citing many cases to sustain the test.

In this case an emergency had arisen, viz., the merging of two competing transportation companies into one. This was the practical effect of the sale by the North Star Company of its only transportation boat to the Columbia & Okanogan Steamboat Company, and it was the duty of the Great Northern Railroad Company, under its instructions from the North Star Company, to do what was reasonably in its power to see that freight which had been consigned to the North Star Company was properly forwarded to its destination, especially when it followed the method pointed out by the agent of the North Star Company in delivering the freight to the Columbia & Okanogan Steamboat Company. The consignor had no place of business

in Wenatchee. The freight was of a perilous character, being a car load of powder. It was the bounden duty of the company in whose charge it was to forward it by the best and most expeditious conveyance to its destination. There being no showing or intimation that the Andrus Company would pay any greater amount of freight for the shipment of its goods as they were shipped than it would have paid if shipped as originally intended, it had no equitable claim to have its goods transported from Wenatchee to Riverside for nothing. The respondent therefore stands upon a severe legal technical right, and must bring himself squarely within the spirit of the rule of the law which he invokes. This we do not think he has done. Under all the circumstances of the case, the goods were substantially shipped according to the original intention of the Andrus Company, and the fact that they were not carried from Wenatchee to Riverside on the same boat that it was the original intention to have them carried on, or, if carried on the same boat, that the boat had changed ownership, was no substantial violation of respondent's rights and in no way injured him.

The judgment will therefore be reversed, and the cause dismissed.

HADLEY, C. J., and RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

UNITED STATES *v.* COLORADO & N. W. R. Co.

(Circuit Court of Appeals, Eighth Circuit, November 25, 1907.)

[157 Fed. Rep. 342.]

Commerce—Interstate Commerce—Safety Appliance Acts—Transportation of Articles in Interstate Commerce for Independent Express Company Is Engaging in Such Commerce.*—The transportation by a common carrier by railroad of articles of interstate commerce for an independent express company is "engaging in interstate commerce by railroad" within the meaning of the safety appliance acts (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 88, 29 Stat. 85; and Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]).

*For the authorities in this series on the question whether a carrier was engaged in interstate commerce on a particular occasion, see foot-notes appended to Adams Ex. Co. *v.* Commonwealth (U. S.), 25 R. R. R. 132, 48 Am. & Eng. R. Cas., N. S., 132; Shore & Bro. *v.* Baltimore & O. R. Co. (S. Car.), 24 R. R. R. 578, 47 Am. & Eng. R. Cas., N. S., 578; State *v.* Omaha Elevator Co. (Neb.), 23 R. R. R. 510, 46 Am. & Eng. R. Cas., N. S., 510.

United States *v.* Colorado & N. W. R. Co

Same—Safety Appliance Acts—Independent Interstate Railroad Companies Are Subject to.†—A common carrier which operates a railroad entirely within a single estate, and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the safety appliance acts (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 88, 29 Stat. 85; Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), although it carries the property free from a common control, management or arrangement with another carrier for continuous carriages or shipments of the articles.

Philips, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

Luther M. Walter and *Ralph Hartzell* (*Earl M. Cranston,* on the brief), for plaintiff in error.

P. H. Holme (*Dines, Whitted & Dines,* on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. The Colorado & Northwestern Railroad Company, a corporation, owned and operated a railroad about 10 miles in length from Boulder to Sunset, and two branches each about 18 miles in length, to Eldora and Ward, respectively. This railroad had a narrow gauge and was entirely within the state of Colorado, but its track had a physical connection with the tracks of the narrow gauge railroads of other companies so that cars could be hauled over narrow gauge railroads from points without the state of Colorado to Boulder, and thence over the railroad of the Northwestern Company. This railroad company was handling express matter over its railroad in accordance with the terms of a contract between its predecessor and Wells, Fargo & Company, an independent express company, whereby the railroad company provided upon each of its passenger, mail, and express trains space and facilities in suitable cars for the storing and handling of, and received and carried on its railroad, all freight, packages, and treasure which the express company tendered to it for transportation, and the express company paid the railroad company therefor 50 per cent. of the gross earnings received by the express company

†For the authorities in this series on the subject of the application of automatic coupler acts, see foot-notes appended to Southern Ry. Co. *v.* Simmons (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

in its operation on the lines of the railroad company, and on through and interchanged business, upon an appraisement based on local merchandise rates. In accordance with this practice the Northwestern Company hauled on July 16, 1906, for the express company, from Boulder to Sunset on its railroad, with an engine that was not equipped with an automatic coupler, a box of liquor which had been received by the express company at St. Louis in the state of Missouri, consigned to Sunset in the state of Colorado, and which was carried by the express company upon its through bill of lading to and delivered at Sunset. The railroad company did not receive, issue a bill of lading for, handle or deliver the package, except as it received it in its car and carried it for the express company in conformity to the practice which has been described. The United States brought an action against the Northwestern Company for the penalty fixed by the safety appliance acts (Acts March 2, 1893, c. 196, § 1, 27 Stat. 531 [U.S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 88, 29 Stat. 85; Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]) for its use in moving interstate traffic of an engine unequipped with an automatic coupler, and upon the facts which have been recited the court instructed the jury to return a verdict for the defendant. The United States insists that this ruling was erroneous, and counsel for the railroad company endeavor to sustain it on the grounds (1) that the express company was not a common carrier subject to the provisions of the interstate commerce act of February 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], and hence the railroad company which carried its packages was not engaged in interstate commerce by railroad within the meaning of the safety appliance acts, and (2) because the Northwestern Company was not subject to the interstate commerce act for the reason that it did not transport the express package, or any other articles of interstate commerce "under a common control, management or arrangement (with another carrier) for a continuous carriage or shipment" and hence was not "engaged in interstate commerce by railroad" within the meaning of the safety appliance acts. It was upon these theories that the case was tried and the verdict was directed below.

But although the express company was not one of the common carriers engaged in interstate commerce to which the original interstate commerce act applied (U. S. *v.* Morsman [D. C.] 42 Fed. 448; Southern Indiana Exp. Co. *v.* U. S. Exp. Co. [C. C.] 88 Fed. 659), the box of liquor it caused to be transported from Missouri to Colorado was an article of interstate commerce, its carriage was a transaction of that commerce, and the express company's participation in its transportation was engaging in interstate commerce. Crutcher *v.* Kentucky, 141 U. S. 47, 57, 58,

59, 11 Sup. Ct. 851, 35 L. Ed. 649; Osborne v. Florida, 164 U. S. 650, 655, 17 Sup. Ct. 214, 41 L. Ed. 586; Caldwell v. North Carolina, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. Ed. 336. Moreover, the interstate commerce act had been so amended that express companies were subject to its provisions before the transportation here in issue was conducted. Act June 29, 1906, c. 3591, §§ 1 and 11, 34 Stat. 584, 595 [U. S. Comp. St. Supp. 1907, pp. 892, 911]. The safety appliance acts declare that "it shall be unlawful for any common carrier engaged in interstate commerce by railroad" (27 Stat. 531, § 1) "to haul or permit to be hauled or used on its line any car" (or engines—Johnson v. Southern Pac. R. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363—except four-wheeled cars and certain logging cars, section 6), "used in moving interstate traffic unequipped with couplers coupling automatically by impact" (section 2), and that every such carrier shall be liable to a penalty of $100 for each violation of the statute. The Northwestern Company transported the box of liquor upon its railroad from Boulder to Sunset for the express company, on its continuous passage from its origin in one state to its prescribed destination in another, and evidence was rejected upon the trial that it was a daily occurrence for this railroad to carry express matter in its cars which had been consigned from points without to places within the state of Colorado. That rejected evidence should have been received because it had a tendency to show that the railroad company was engaged in interstate commerce and if the testimony had fulfilled the promise of the question propounded to elicit it and had been uncontradicted, the fact would have been established that the company was thus engaged within the meaning of the safety appliance acts. The transportation by a common carrier by railroad of articles of interstate commerce for an independent express company is engaging in interstate commerce by railroad as effectually as their carriage by it for the vendors or consignors.

Probably the clause "under a common control, management or arrangement for a continuous carriage or shipment" in the first section of the interstate commerce act qualified carriers "partly by railroad and partly by water" only, although there is high authority to the contrary (U. S. v. Geedes, 65 C. C. A. 320, 131 Fed. 452; Interstate Commerce Commission v. Bellaire, Z. & C. Ry. Co. [C. C.] 77 Fed. 942; Ex parte Koehler [C. C.] 30 Fed. 867; U. S. v. Chicago, K. & S. R. Co. [C. C.] 81 Fed. 783) and it is certain that this clause is thus limited in its effect since the passage of the amendatory act of June 29, 1906 (34 Stat. 584, 595, c. 3591, §§ 1, 11 [U. S. Comp. St. Supp. 1907, pp. 892, 911]). Conceding, however, but not deciding or admitting, that this clause qualified and specified the common carriers wholly by railroad that were subject to the provisions of

the interstate commerce act prior to the amendments of 1906, the clause is not found in any of the safety appliance acts, those acts plainly declare that it is unlawful for any common carrier engaged in interstate commerce by railroad to use cars unequipped with automatic couplers to move interstate traffic, and notwithstanding the opinion of the Circuit Court of Appeals of the Sixth Circuit in U. S. v. Geddes, 65 C. C. A. 320, 131 Fed. 452, which has been thoughtfully considered with that profound respect and deference which is due to the views of the eminent judges who announced it, our minds have been forced to the conclusion that the exception of common carriers using cars upon railroads wholly within single states to move interstate traffic free from "a common control, management or arrangement" with another carrier for a continuous carriage or shipment, may not be lawfully imported by construction into the safety appliance acts. The reasons which led us to this conclusion have been stated in the opinion in United States v. Colorado & Northwestern Railroad Company, 157 Fed. 321, which is filed herewith, and it is useless to repeat them here.

Our conclusion is that a common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the safety appliance acts, although it carries the property free from a common control, management, or arrangement with another carrier for continuous carriages or shipments of the goods.

In the light of this conclusion error crept into the trial of the case in the court below because it followed the contrary view, and for this reason the judgment below must be reversed, and the case must be remanded to the District Court for a new trial, and it is so ordered.

BALTIMORE & O. R. CO. *v.* MCILYAR.

(Supreme Court of Ohio, Jan. 21, 1908.)

[83 N. E. Rep. 497.]

Railroads—Injury to Stock—Repairs to Fence.—Where a railroad company is proceeding to repair or rebuild a defective fence along the line of its right of way and upon the line where the fence has always been, and the adjoining landowner orders the company's employees off the premises and notifies the company to stop work, claiming that the line of the old fence is not the true line, and the adjoining proprietor continues to use his land as a pasture, knowing that the fence is defective and dangerous, without revoking or modifying his warning to the company or doing anything to determine the true line, and his horse is then injured by becoming entangled in the loose barbed wire of the defective fence, he cannot recover for the injury to the animal, because his own conduct has proximately contributed to bring about the condition which resulted in the injury.

(Syllabus by the Court.)

Error to Circuit Court, Guernsey County.

Action by one McIlyar against the Baltimore & Ohio Railroad Company. Judgment for plaintiff was affirmed by the circuit court, and defendant brings error. Reversed, and judgment rendered for defendant.

This action was brought to recover damages from the railroad company for an injury to the plaintiff's horse by its coming in contact with a barbed wire belonging to the fence between the company's right of way and the plaintiff's premises. The petition alleged that it was the company's duty to construct and maintain in good repair a fence between its railroad and the land of the plaintiff, and that it had theretofore constructed such a fence. It then proceeds to charge as follows: "Without any knowledge or fault on the part of plaintiff, the defendant neglected and failed to maintain said fence in good repair, and negligently and carelessly caused, suffered, and permitted said fence to be broken down, and said strands of barbed wire to be detached in places from the posts, and stretched and thrown down for a considerable distance, on said plaintiff's parcel of ground, and to remain there." Plaintiff then avers that his horse became entangled in the said barbed wire and was injured thereby, for which he prays judgment. The defendant filed a demurrer to the petition, which was overruled. The defendant answered, admitting that it was a railroad company operating the railroad referred to in the petition, and denying the other averments of the petition, and pleading contributory negligence by the plaintiff. Plaintiff replied, denying

the averments as to his negligence. On the trial, at the close of all the evidence, the defendant moved the court to direct a verdict in its favor. This motion was overruled, and a verdict was rendered for the plaintiff. Before judgment upon the verdict was rendered, the defendant moved for judgment notwithstanding the verdict, on the ground that the petition did not state facts sufficient to constitute a cause of action, and that upon the pleadings the defendant was entitled to judgment. This motion was likewise overruled. Motion for a new trial was filed, overruled, and exception taken thereto. Judgment was rendered on the verdict, and on error this judgment was affirmed by the circuit court. Plaintiff in error, defendant below, prosecutes error in this court to obtain reversal of the judgments of the courts below.

Fred L. Rosemond and *F. A. Durban,* for plaintiff in error.
J. B. Ferguson, for defendant in error.

DAVIS, J. (after stating the facts as above). It convincingly appears that there was a defective fence between the railroad company's right of way and the plaintiff's land, that the plaintiff knew that the fence was defective, that the railroad company had men and material on the ground and was proceeding with the work of reconstructing the fence on the same line on which the old fence was situated, and that the plaintiff thereupon, claiming that the fence was not on the true line, both orally and in writing notified the company's employees to cease erecting a fence on that line, accompanying the notice with a covert threat that if they did not heed the warning they would have to take the consequences. The company's servants thereupon left the fence in the condition in which it was when the plaintiff ordered them to stop the work. The plaintiff never retracted or modified this demand or order; and with full knowledge of the condition of the fence he continued to pasture his horse there for about two years, until it was injured on his own premises by becoming entangled in a barbed wire belonging to the fence and lying loose upon the ground.

Under these facts, which are substantially undisputed, it does not seem to us to be necessary to determine whether the demurrer to the petition should have been sustained or overruled, nor whether the standards of the common law or those of the statute regulating the fencing of railways should be applied in this case. If it be conceded that it was the duty of the railroad company to so construct and maintain a fence between its premises and those of the plaintiff as to avoid injuring the plaintiff's stock while on his land, and not on the railroad track or right of way, we are still confronted with the question whether the plaintiff has not forfeited whatever right to compensation he might have had by his own contributory negligence; for it was elaborately discussed and decided in Railway Co. *v.* Methven, 21 Ohio

St. 586, that whether the right of recovery be under the common law or under a statute, the doctrine of contributory negligence applies, unless it is clearly forbidden by statute.

The facts in this case show that the plaintiff was directly responsible for the condition of the fence at the time the horse was injured. It was being rebuilt when he peremptorily ordered the workmen away. His alleged reason for doing so may have been a good one; but, whether he was right or wrong in his claim that the company was encroaching on his land, it should at least appear that he made some effort, during the two years that elapsed before the accident, to settle the true line. The company was proceeding to reconstruct the fence on the line formerly occupied; and it is not suggested that it had ever been disputed before; nor is there anything in the record to raise even a suspicion that it was not the true line, except the plaintiff's denial; and, indeed, the plaintiff admitted on the trial that the fence was on the true line. The railroad company, therefore, so far as the rights of the plaintiff are concerned, was absolved from the duty of repairing or reconstructing the fence so long as his notice and the accompanying threats stood unretracted, and so long as the dispute about the line was not settled.

The judgment of the circuit court and that of the court of common pleas are reversed, and we render a final judgment for plaintiff in error.

STOTLER *et al. v.* CHICAGO & A. RY. CO. *et al.*

(Supreme Court of Missouri, Division No. 2, June 11, 1907.)

[103 S. W. Rep. 1.]

Railroads—Accident at Crossing—Contributory Negligence.*—Decedent was guilty of contributory negligence barring recovery for her death in collision with a train at a railway crossing, where in the daytime she attempted to drive across the track in a buggy with

*For the authorities in this series on the question whether there can be a recovery for injuries inflicted by a train which the highway traveler should have discovered to be approaching before he made an attempt to cross the tracks, see Keler *v.* Erie R. Co. (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; Fannenberg *v.* Conestoga Traction Co. (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80; Schmidt *v.* Missouri Pac. Ry. Co. (Mo.), 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806; Colomb *v.* Portland & B. St. Ry. (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293 (accident to child); Cowen *v.* Dietrick (Md.), 17 R. R. R. 359, 40 Am. & Eng. R. Cas., N. S., 359; Wolf *v.* Washington Ry. & Nav. Co. (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; Marshall

the top down, and with an unobstructed view of the train's approach at 40 or 50 feet before reaching the crossing, driving in a trot, making no stop, and apparently not looking up the track.

Same—Speed—Right to Presume Compliance with Ordinance.†—One attempting to drive across a railway crossing in a town had no right to presume that an approaching train was not running in violation of a speed ordinance, where, when within from 40 to 60 feet of the crossing, if she looked, she would have known it was running at a high rate of speed.

Appeal from Circuit Court, Audrain County; Alex. Waller, Judge.

Action by George W. Stotler and others against the Chicago & Alton Railway Company and others. Judgment for plaintiffs, and defendants appeal. Reversed.

v. Green Bay & W. R. Co. (Wis.), 16 R. R. R. 138, 39 Am. & Eng. R. Cas., N. S., 138 (recovery prevented where driver of vehicle could have seen train while 68 feet from track, although he testified that he looked and listened); Birmingham Ry. L. & P. Co. *v.* Oldham (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165 (failure to look for street car, which could have been seen, and mere negligence of those operating car); Portsmouth St. R. Co. *v.* Peed's Adm'r (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65 (contributory negligence in stepping in front of moving street car, when it was too close for collision to be avoided by utmost care on part of those in charge of car, prevented recovery); Quinn *v.* Chicago & C. R. Co. (Iowa), 12 R. R. R. 661, 35 Am. & Eng. R. Cas., N. S., 661 (failure to see train while watching another train); Doflini *v.* Erie R. Co. (N. Y.), 12 R. R. R. 291, 35 Am. & Eng. R. Cas., N. S., 291; Steber *v.* Chicago & N. W. Ry. Co. (Wis.), 6 R. R. R. 656, 29 Am. & Eng. R. Cas., N. S., 656 (crossing track to board train without seeing other train, in plain view); Louisville & N. R. Co. *v.* Mitchell (Ala.), 4 R. R. R. 425, 27 Am. & Eng. R. Cas., N. S., 425 (one who starts to cross railroad track so near approaching train, which he could have seen, that he is struck before he gets across, is guilty of contributory negligence); Metropolitan St. Ry. Co. *v.* Agnew (Kan.), 4 R. R. R. 589, 27 Am. & Eng. R. Cas., N. S., 589 (person crossing street railway tracks is chargeable with notice of approach of any car within range of vision); Northern Pac. R. Co. *v.* Freeman (U. S.), 15 Am. & Eng. R. Cas., N. S., 89 (one injured at crossing where he should have seen train in time was guilty of contributory negligence as a matter of law); Ring *v.* Chicago, etc., Ry. Co. (Iowa), 11 Am. & Eng. R. Cas., N. S., 93 (pedestrian injured while attempting to cross track, by a train which he might have seen in time had he exercised the slightest care, is guilty of contributory negligence as a matter of law, and defendants' negligence need not be considered in an action to recover for such injury); Seamans *v.* Delaware, etc., R. Co., 174 Pa. St. 421, 4 Am. & Eng. R. Cas., N. S., 260; Sullivan *v.* New York, etc., R. Co., 175 Pa. St. 361, 4 Am. & Eng. R. Cas., N. S., 361.

†For the authorities in this series on the subject of the right of persons about to cross railroad tracks to assume that those in charge of trains or cars will perform their duties, see foot-notes appended to Elgin, etc., Ry. Co. *v.* Hoadley (Ill.), 22 R. R. R. 663, 45 Am. & Eng. R. Cas., N. S., 663.

Stotler *v.* Chicago & A. Ry. Co

From a judgment rendered in the circuit court of Callaway county, Mo., in favor of plaintiffs, defendants appeal. This suit was originally instituted in the circuit court of Audrain county on July 18, 1903. The cause was removed, upon the application of the defendants Wiseman and Haines, to Callaway county, where it was finally tried at the August term, 1904, of said court. This is a suit by the minor children of Phœbe Stotler to receive statutory penalty of $5,000 for the wrongful killing of their mother. The plaintiffs' petition states, in substance, that they are minors under the age of 18 and 21 years; that they bring this suit by John W. Stotler, their duly appointed guardian and curator; that the defendant railway company is incorporated under the laws of the state of Illinois, and operates a railroad running from Louisiana, Mo., through the city of Laddonia, in Audrain county, Mo., to Kansas City, Mo.; that defendants Wiseman and Haines are residents of Missouri and employees of their codefendant, acting respectively as engineer and conductor of the train doing the injury on the —— day of April, 1903, the deceased was driving a vehicle in Laddonia, Mo.; and that while driving north on a public road or street in said city, commonly called Pine street, which said street crosses defendant railway company's track in said city, and while said vehicle and the deceased were in the act of crossing the track, they were struck by an engine and caboose owned by and under the control of defendants, running east on defendant's track, and the said Phœbe Stotler was killed. Plaintiffs then pleaded a violation of an ordinance of the city of Laddonia, which provides that it shall be unlawful for any railroad company or its agents, servants, or employees to run upon its tracks or switches within that part of the corporate limits of said city where said railroad track, tracks, or switches are unfenced, any locomotive, car, or train of cars, at a rate of speed to exceed eight miles per hour. The petition further states that at and near said crossing the tracks of defendant are unfenced, said crossing is in the corporate limits of said city; that it was the duty of defendants to have its locomotives and cars under full control, and to keep a lookout for travelers when approaching said crossing; that defendant did not within 80 rods, or within any other distance, of said crossing, ring the bell or blow the whistle on said train of cars and keep the same ringing and blowing until said engine had passed said crossing, but negligently and carelessly and unlawfully failed and refused to give any signals at all of the approach of said crossing; that the defendant saw and knew, or by the exercise of due diligence might have seen and known, that the deceased was in a perilous position and unaware thereof, and unable to escape from the impending danger; that they negligently failed to sound the usual and ordinary signals of danger in time to evert the injury, and negligently and carelessly failed to stop or slacken the speed of said train, when as a matter

of fact, by the exercise of due care, they might have stopped or slackened the speed thereof in time to avert said injury; that the deceased, at the time of her death, was a widow, and left no husband surviving her; and that the plaintiffs herein are her minor children, and they were dependent upon her for support. In due time the railway company filed its petition and bond in the circuit court of Audrain county for the removal of the cause of the United States Circuit Court for the Eastern District of Missouri, on the ground of diverse citizenship between the defendant and plaintiffs and their guardian and curator. The petition further alleged that defendants Wiseman and Haines were residents of Missouri; that they are fraudulently and improperly joined as parties defendant for the sole purpose of defeating the right of defendant company to such removal; that plaintiffs' petition stated no cause of action against Wiseman and Haines; and that the negligence alleged against Wiseman and Haines is nonfeasance only, and for which said defendants are liable only to the defendant company. The petition denies that plaintiffs have any cause of action against it or its codefendants, and avers that the defendants have a good and sufficient defense thereto, and, even if the facts alleged in the petition are true, the liability, if any, exists against the defendant company only; that in pleading an ordinance of the city of Laddonia plaintiffs do not allege that said ordinance had been accepted by the petitioner or its codefendants; and that said ordinance is merely penal, and not binding on the defendants. The petition for removal of the cause was denied. The defendants Wiseman and Haines filed a demurrer, alleging that the petition of plaintiffs does not state a cause of action against either of these defendants, that they are not necessary parties to a complete determination of the action, and that there is a misjoinder of parties defendant. This demurrer was by the court overruled. Thereafter, during the same term, defendants Wiseman and Haines filed their application for a change of venue, and the venue of said cause was by order of court changed to the circuit court of Callaway county, Mo. In the circuit court of Callaway county defendant company filed what is termed by them a "plea in abatement," in which the jurisdiction of the state court is challenged, and setting forth the various unsuccessful steps taken for the removal of the cause, together with the adverse rulings of the circuit court of Audrain county thereon, which plea in abatement was by the court overruled, to which the defendant company duly excepted. The answer of the defendant company was a general denial and a further plea that the death of plaintiffs' mother was caused by her own contributory negligence and that of plaintiff Eugenia Stotler. The answer pleaded the unreasonableness and invalidity of the speed ordinance of the town of Laddonia and want of jurisdiction of the court, grounded upon the application for the removal of the cause to the federal court. The an-

swer of defendants Wiseman and Haines consisted of a general denial and plea of contributory negligence. The reply was a general denial.

The testimony devloped at the trial of this cause was substantially the same as in the case of Eugenia Stotler against these same defendants (98 S. W. 509), and tended to show about this state of facts: Laddonia is a small town of about 700 inhabitants, in Audrain county, about four miles eastwardly of Rush Hill. Most of its inhabitants live south of defendant railway company's right of way, which extends substantially in an easterly and westerly direction through the northern part of the land included in the city limits. On or about the 22d day of April, 1903, between 6 and 7o'clock, the deceased and her daughter were riding in a one-horse buggy, with the top down, going north on Pine street. At this crossing Pine street runs directly north and south. When at this crossing the hind wheels of their buggy were struck by a train, consisting of engine and caboose, running east on said track. In the collision the mother of the plaintiffs was killed. The crossing was the most frequented crossing in Laddonia. On the part of the plaintiffs the testimony tended to show that a number of dwelling houses are located on the west side of Pine street, and on the south side of the railroad, and that a few feet south of the right of way of the defendant company are two frame buildings, one of which is a story and a half, and the other a one story building. R. S. McKinney testified for the plaintiff that he was surveyor of Audrain county. This witness made a plat of the crossing and measurements. He testified that a person would have to be within 50 feet the tracks to get a view to the west. C. A. Smith and J. A. Pierce also testified for plaintiffs. They state that they secured a horse and buggy and made some observation at the place where the accident occurred, as to distance, time, and so forth. These witnesses testify that, before one riding in an ordinary one-horse buggy could see to the west, the horse's head would be within 30 feet of the south rail of the main track. It was further shown that an ordinary buggy measures about nine feet from the seat to the end of the shaft, and that a horse's head is usually about two or two and a half feet above the shaft. T. Kidd testified for plaintiffs substantially as follows: That at the time of the accident he was traveling south on Pine street, about two blocks from the crossing; that his attention was attracted by the whistle of the train, and he saw the train about the time it struck the vehicle; that he did not hear a whistle sounded or bell rung prior to the time the train reached the cattle guard and before the accident. In describing the manner in which the deceased approached the track this witness said: "She just came up in a slow trot. She drove upon the track, and it looked to me like the horse just slacked up a little when the train struck the buggy. Q. Where was the horse at the time you say it slacked

up a little? A. The horse was right on the track. Q. Up to that time state whether or not she had stopped, so far as you know. A. I didn't see her stop. Q. What part of the outfit was struck? A. It looked to me like it struck about the center of the buggy. Q. She went on in a slow jog up to that time, when the horse checked up a little when it got on the main track, and then went over? A. Yes, sir. Q. Did you see her turn her head and look in any direction as she approached the track? A. No, sir; I didn't notice her turn her head at all." This witness testified that the train was running at least 30 or 40 miles an hour at the time of the accident. One of the witnesses for the plaintiffs estimated the speed of the train at the time of the accident at from 60 to 80 miles per hour, while the other witnesses estimated it at from 40 to 60 miles an hour. After the accident the engine ran down past the second elevator east of the depot. From the crossing to the elevator mentioned the distance was shown to be 842½ feet, and that the depot was located 221 feet and 8 inches east of the crossing. Wm. O. Montague testified for plaintiffs substantially as follows: That he was 19 years old, and his occupation was a farmer, and lived in Audrain county, near Laddonia, and had lived there all his life; that at the time of this accident he was at the house of a neighbor, southwest of the crossing, a distance of between half a quarter and a quarter of a mile, and when he first noticed the train it was a little east of Rush Hill, which is four miles from the station of Laddonia; that when his attention was called to the train he noticed it continuously until it passed out of his view behind a barn; that the distance from the barn to the center of the street or crossing where the accident occurred is about 100 or 150 yards, but that he had not measured it; that he did not hear a bell rung or whistle sounded by the engine until just as it was going behind the barn; that he did not see the accident, and could not see the crossing from where he was located. This witness stated that the track or country between Rush Hill and Laddonia is an open prairie county. Plaintiffs also offered evidence tending to show that, on the trial of the case of Eugenia Stotler against these defendants, defendants Wiseman and Haines testified that the speed of the train at the time it struck the buggy in which the deceased and Eugenia Stotler were riding was from 22 to 25 miles an hour.

On behalf of the defendants, L. S. Simpson testified that he was the night telegraph operator at Laddonia at the time of the accident; that there was a semaphore signal at the depot at Laddonia, and, when the engine which struck and killed Mrs. Stotler was approaching the corporate limits of the city of Laddonia from the west, this signal indicated an order to stop; that he was in the depot when he saw the train approaching, and when they reached the general whistling point the engine gave a signal for the station, which is one long whistle; that he had no orders for

them, and gave them the order to proceed, which was done by holding down the arm of the semaphore signal; and that the engineer answered it by two short whistles. This witness stated that the engine was at the usual whistling post, which is about a quarter of a mile west of the crossing, when the signals were given. He further states that, when the engine passed the depot, the brakes were applied, and that they seemed to be trying to stop it. Defendants also offered evidence by two civil engineers, tending to show from surveys made by them that there was nothing to obstruct the view of a person walking or driving in a vehicle such as Mrs. Stotler occupied, from a point 63 feet south of the south rail of this track, up to the track, of a locomotive approaching from the west for a distance of two miles. That a person riding as the deceased was could see the rails of the railroad track from the time she was within 63 feet of the south rail of the main track until she reached it, for a distance of the west of at least 2,000 feet. That the right of way of the railroad, which is 100 feet wide west of the public road where the accident occurred, is fenced on either side for several miles west of Laddonia up to within about 120 feet of the road where the accident occurred, at which place there is a cross-fence with a cattle guard at the track, and the track west of the crossing is exactly straight for a mile or more. That the right of way at that place runs from the west a little north of east, and the public road runs about north and south. The public road crosses the railroad track at grade. And that there is a very slight slope of about a foot upward as you approach the track from either side for a distance of about 50 feet.

This is a sufficient reference to the facts developed at the trial to enable us to determine the legal propositions disclosed by the record. At the close of the evidence, defendants requested an instruction in the nature of a demurrer, directing the jury, under the pleadings and evidence, to find the issues for defendants. This request was denied. The court then submitted the cause to the jury upon instructions covering the entire case. The jury returned a verdict finding the issues for the plaintiffs, assessing the statutory penalty in the sum of $5,000. Timely motions for new trial and in arrest of judgment were filed and by the court everruled. Judgment was rendered in accordance with the verdict for the amount of the penalty assessed by the jury, and from this judgment defendants in proper form and due time prosecuted their appeal to this court, and the record is now before us for consideration.

Scarritt, Scarritt & Jones, for appellants.
P. H. Cullen, W. H. Logan, and *Walter Burch,* for respondents.

Fox, P. J. (after stating the facts). The record before us in this cause discloses the assignment of numerous errors, but it

is manifest that there is but one vital proposition confronting us for consideration; that is, under all the evidence disclosed by the record, are the plaintiffs entitled to recover, and did the trial court commit error in denying the instruction at the close of the evidence in the nature of a demurrer directing the jury to find the issues for the defendants? The controlling facts in this cause, as is indicated in the statement of the cause, are substantially the same as the facts developed in the case of Eugenia Stotler against these same defendants, in 98 S. W. 509. The testimony in this case tends to show, and it must be taken as establishing beyond dispute, the fact that the defendants at the time and place of the accident were operating this engine and car at a rate of speed in violation of the ordinances of the town of Laddonia. As to the rate of speed, there is a conflict of testimony; some of the witness fixing it between 30 and 50 miles an hour, others between 22 and 25, and one witness between 60 and 80 miles an hour. However, we are inclined of the opinion that the weight of testimony shows that the engine was running between 40 and 50 miles an hour. The testimony on the part of the plaintiffs shows that the deceased, in the language of the witness who saw her approaching the track, drove upon the track in a slow trot, and that she did not slack up until the train struck the buggy. She did not stop, and the only eyewitness says that she went on in a slow jog up to the time when the horse checked up a little when it got on the main track. This witness further says—and he was watching the accident—that he did not notice her turn her head at all, and in his opinion the train was running at least 30 or 40 miles an hour at the time of the accident. The testimony is also undisputed as to the fact that the deceased and her daughter were riding in a one-horse top buggy, and that the top was down; the mother doing the driving. There is some conflict in the testimony as to the distance from the crossing of the main track where the accident occurred that the deceased and her daughter could have an unobstructed view to the west and see an engine approaching. However, the testimony on the part of the plaintiffs shows that, when they were within 40 or 50 feet of the track, they would have a view of the track, and, if they were looking, could easily see an engine approaching the crossing. There was other testimony tending to show that they had an unobstructed view of the approach of the engine to this crossing; that is to say, between 60 and 65 feet. That the deceased, had she been looking, could have seen this engine approaching the crossing where she was killed, when she was 40 or 50 feet from the track, the testimony leaves no ground for dispute. Witness T. Kidd, who testified in behalf of the plaintiffs, was the only person who saw the accident, and he thus describes it: "She just came up in a slow trot. She drove upon the track, and it looked to me like the horse just slacked up a little when the train struck the buggy. Q. Where was the buggy at

the time you say it slacked up a little? A. The horse was right on the track. Q. Up to that time, state whether or not she had stopped, so far as you know. A. I didn't see her stop. Q. What part of the outfit was struck? A. It looked to me like it struck about the center of the buggy. Q. She went on in a slow jog up to that time, when the horse checked up a little when it got on the main track, and then went over? A. Yes, sir. Q. Did you see her turn her head and look in any direction as she approached the track? A. No, sir; I didn't notice her turn her head at all." We have in this case, when the facts as disclosed by the record are analyzed, an engine running at a very rapid rate of speed approaching the crossing, and Mrs. Stotler, the deceased, driving in a buggy with the top down, in broad daylight, with a plain, unobstructed view of the approach of the engine at least 40 or 50 feet before she reached the crossing, driving the horse in a trot, making no stop, and, so far as the witness who was looking at the occurrence, did not turn her head at all, drove upon the track, and was then struck and killed by the engine being operated by the defendant's servants and employees. Therefore the simple question confronts us: Are the plaintiffs entitled to recover under that state of facts?

In the case of Eugenia Stotler against these same defendants, for the recovery of damages for injuries received in the same accident now under consideration, this court in banc affirmed the judgment and while the esteemed and learned judge, in expressing the views of this court as applicable to that case, disclaims any intention to decide any cause which might arise from the death of the mother in the same accident, and while it is true, as stated, that the cause of action resulting from the death of the mother was not decided, yet it is apparent that the controlling facts in the two cases could not be separated. The main defense in the Eugenia Stotler Case was that her injuries were inflicted by reason of the negligence of her mother, and that she participated in, or at least acquiesced in, her mother's negligence in driving upon the track in front of the approaching engine, and was therefore equally guilty of contributory negligence. In other words, we are unable to see how this court in banc could determine the case of Eugenia Stotler without discussing the facts applicable to the negligence of her mother. It being conceded that the facts in the case at bar are substantially the same as in the Eugenia Stotler Case, and if the conclusions as announced in that case, which were clearly applicable to the acts of the mother at the time of this accident, are to be followed, we see no escape from the result that the judgment in this cause must be reversed. The Eugenia Stotler Case was decided by the court in banc, and was concurred in by all the members of this court. It carefully discusses all the facts and exhaustively reviews all the authorities as applicable to them, and no one can read the opinion and escape

the conclusion that the court in banc, under all the evidence in respect to this accident, regarded the acts of the mother, Mrs. Stotler as constituting such negligence as would bar a recovery in an action for her death. An analysis of the conclusions announced in that case will demonstrate that the affirmance of the judgment in favor of Eugenia Stotler was only affirmed upon the theory that she did not participate in and was not responsible for the negligence of her mother. After discussing the facts and reviewing all the authorities upon the subject in hand, the conclusion was thus stated: "Now, if this case be viewed from the standpoint of plaintiff's evidence, she is presumed to have looked and listened, and to have seen and heard the train. If it be viewed from the standpoint of defendants' evidence, she actually did see the train when it was 40 rods away, and she was still in a place of safety south of the track. The case, then, has progressed to the point where fault can be found with plaintiff, if at all, not in her not looking and listening, in her not seeing and hearing the advancing train, but in the act of driving on the track immediately before that train. The act in question was not hers; but if she actively participated in that act, or is responsible therefor, she ought not to recover. If she did not actively participate therein, and is not responsible therefor, then there is no independent cause intervening between defendants' negligence and the injury, and that injury should be referred to defendants' negligence alone." Following this court then gave particular stress to the theory that Eugenia Stotler was not responsible for the negligence of her mother, and fully discussed the reasons why she should not be held responsible for such negligence, and finally concluded by saying, concerning the conduct of Eugenia Stotler on that occasion, that "the truth is she was but a broken branch cast on the stream of the mother's judgment and volition, prone to be borne away on its current, and, under such circumstances, defendants may not acquit themselves by pointing to the mother's fault."

It is manifest that there can be but one logical conclusion from what was said by the court in banc in that case; and that is, under the facts developed at the trial, which were substantially, as is conceded by counsel for plaintiff, the same as in the case at bar, by reason of the negligence of the mother, Mrs. Stotler, driving upon the track in front of an approaching engine, there could be no recovery in an action against the defendants in causing her death. The conclusion as to the acts of Mrs. Stotler being negligent, as is clearly indicated in the case of her daughter, is fully supported by numerous well-considered cases in this state.

In Hayden *v.* Railway Co., 124 Mo. 566, 28 S. W. 74, plaintiff sought to recover damages for the death of her husband, who was struck and killed by one of defendant's passenger trains on a public road crossing. The petition charged that his death was

caused by the negligence of the defendant in allowing prairie grass and weeds to grow upon its right of way and near said crossing, so far as to obstruct the view of its tracks, and in failing to sound the whistle or ring the bell on the approach of its train to said crossing, as required by law. The answer was a general denial and a plea of contributory negligence. The evidence tended to show that the servants of the railroad company were negligent in failing to give signals, but it also tended to show that the deceased could have seen the train by looking. The husband of plaintiff was driving a two-horse team to a wagon, and could have seen the approaching train when it was from 15 to 30 feet of the crossing. At the close of all the evidence, the court sustained a demurrer thereto, and plaintiff appealed. The court in that case stated that the train was traveling 10 times as fast as plaintiff, and that, when he was in 15, 20, 25, or 30 feet from the crossing, the train must have been within a distance of 150 to 300 feet of the crossing. The court then fully reviewed the facts, and held that the testimony showed clearly that, notwithstanding there was high grass intervening between the plaintiff's husband and the train, by the turning of his eye when in 15 or 20 feet of the crossing he could have seen the train approaching, which was 150 or 300 feet away, and that his failure to observe the approach of the train and proceeding in his way across the track was such negligence as would bar recovery, and this court said in that case that, "though the defendant may have been negligent in failing to give the signals for the crossing, and in permitting the high grass to be upon its right of way, yet, the deceased having lost his life through his own negligence in failing to discharge the duty imposed upon him by law, in his situation, the plaintiff cannot recover for his death."

In Huggart *v.* Railroad, 134 Mo. 673, 36 S. W. 220, Gantt, P. J., speaking for the court, said: "It is an uncontradicted and conceded fact that, when he reached a point from 30 to 40 feet from the track, a point where he was free from all danger of collision with trains upon the road, he could have seen up the track to the west a distance of 600, and possibly 1,000, feet. As a physical fact that train was then in sight. One of two conclusions is inevitable. He either did not look, and heedlessly rode upon the track and was killed, or he looked and saw the approaching train and attempted to cross ahead of it. In either case he was guilty of such contributory negligence as bars a recovery by his widow. Porter Huggart is dead. We have no explanation of his conduct in attempting to cross the track in the face of a rapidly approaching train; but, in view of the physical impossibility of his failing to see the train, had he looked to the west as it was his clear duty to have done while yet out of danger, the law denominates his conduct in going upon the track and attempting to cross as contributory negligence. There can be no presumption of or-

dinary care in the face of such facts to the contrary and without explanation." Hayden *v.* Railroad, 124 Mo. 566, 28 S. W. 74; Kelsay *v.* Railroad, 129 Mo. 362, 30 S. W. 339; Lane *v.* Railroad, 132 Mo. 4, 33 S. W. 645, 1128.

In Sanguineete *v.* Railroad, 196 Mo. 466, 95 S. W. 386, this court, speaking through Judge Burgess, denied plaintiff a recovery on the ground of negligence in attempting to cross the defendant's railroad track in front of an approaching train, for the reason that proper care and caution was not exercised in listening and looking for the approach of such train. In this case the rule as announced by Elliott (section 1165) was quoted approvingly. It is there said: "As a railroad track is a warning of danger, one who attempts to cross it must act with care proportionate to the danger, and not suffer his attention to be diverted from the danger before him, and he must keep his faculties in active exercise. It is his duty to keep his faculties in condition for exercise and to exercise them. Mental abscription or reverie will not excuse the traveler who omits to perform the duty of looking and listening. If the traveler could have seen the train by looking, the presumption is that he did not look, or, if he did look, did not heed what he saw. This presumption, in conjunction with the fact that the courts judicially know that great throngs of persons daily cross railroad tracks without receiving injury, renders necessary and logical the conclusion that *prima facie* an accident at a crossing is attributable to the negligence of the traveler. A traveler who knows that a train is due must take care to avoid it, and this knowledge imposes upon him a somewhat higher exercise of care than if he was not in possession of such knowledge. Principle requires that in such a case a person who attempts to cross the track should be held guilty of negligence as matter of law, if there are obstructions to sight or hearing, since no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety. Analogous cases emphatically affirm that one who assumes to proceed upon a calculation of chances is guilty of negligence, and the rule established by those cases applies to such cases as we have mentioned."

In Schmidt *v.* Railroad, 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196, Judge Gantt thus stated the rules of law applicable to the subject under discussion: "It is a settled law of this state that a person who goes upon a railroad track, or proposes to cross it, must use his eyes and ears to avoid injury; and, while a neglect of the regulations in regard to the running of trains amounts to negligence in law on the part of the railway company, this does not absolve pedestrians and others who propose to cross the tracks from the exercise of ordinary care. Every intelligent person who has arrived at years of dis-

cretion is presumed to know that it is dangerous to be upon a railroad track when trains are passing to and fro, and, when crossing one, he is expected to be vigilant and watchful of the approach of the locomotive. The failure to exercise such vigilance is negligence per se. Harlan *v.* Railroad, 64 Mo. 482. "The law that a traveler, before entering upon a railroad track, must observe some caution for his own safety, and that a failure to do so will be such negligence as will preclude a recovery in case of injury, is as well settled in this state as is the law that a railroad company is guilty of negligence in running a train without observing the reasonable precaution required by law or ordinance. The measure of precaution to be observed by a traveler depends often upon the circumstances and surroundings. The general rule is that, in knowing by approaching the track of a railroad, he must use his sense of sight or hearing to ascertain if there be danger. If the view is so obstructed that he cannot see, he should carefully listen. The circumstances may not require that he both look and listen, but common prudence requires that he do either one or the other, and a failure to do so renders his act negligence is not changed or abrogated by reason of a statute or ordinance imposing the duty on account of the violation of which the injury resulted. Weller *v.* Railroad, 120 Mo. 653. The statute does not absolve persons approaching a public railway crossing from exercising common prudence to avoid danger, nor shift the responsibility to another should injury ensue from the failure to exercise it." Kenney *v.* Railroad, 105 Mo. 284, 15 S. W. 983, 16 S. W. 837.

In Boring *v.* Street Ry. Co., 194 Mo. 541, 92 S. W. 655, the testimony tended to show that the plaintiff did not stop or look to see if a car was approaching from the east, from the time he left the sidewalk at the northeast corner of Cherry and Fifteenth street, until the moment the car struck him. The distance between the point where he made the turn, at the northeast corner of said streets, and the point where he attempted to cross the track, was but comparatively a few feet, and there is no evidence tending to show that the gripman could, by the exercise of due care and diligence, have stopped the car in time to have prevented the accident. Burgess, J., in announcing the conclusions of this court, said: "The evidence shows that the plaintiff was unobservant, careless of his safety, and walked into danger. There is nothing disclosed by the record which would justify the submission of the cause to the jury."

In Reno *v.* Railway Co., 180 Mo. 469, 79 S. W. 464, this court again said, in discussing the proposition now under consideration, that, "from the testimony of plaintiff, and that given in her behalf, one of two inferences must be drawn: Either that plaintiff saw the car and attempted to pass in front of it, or that she did not look for the car's approach and attempted to cross over the tracks

in disregard of it; and in either case she was guilty of negligence which at least contributed to her injury."

In Kelsay *v.* Railway Co., 129 Mo. 362, 30 S. W. 339, Judge MacFarlane, in treating of this proposition, stated the rule in this way: "The duty of a traveler upon a highway, in approaching a railroad crossing, to use all reasonable precautions to ascertain the approach of trains, and to avoid injury by them, is well-settled law, not only of this court, but perhaps of all the courts of this country. The rule imperatively requires him to look carefully, in both directions, at a convenient distance from the crossing, before venturing upon it, if, by looking, a train could be seen. The duty will not be performed by attempting to look only from a point at which the view is obstructed. The duty is a continuing one until the crossing is reached. If there is a point between the obstruction and the track which gives opportunity to see, it is the duty of the traveler to look. He cannot close his eyes, and thereby relieve himself of the consequences of his own neglect. Hayden *v.* Railway, 124 Mo. 566, 28 S. W. 74." The esteemed and learned judge, in further discussing the proposition in hand, approvingly made this quotation. He said: "It was said in a recent case: 'It is simply and flatly impossible that one can stop, look, and listen for an approaching train that is in plain view and close at hand and be unable to see or hear it, if he possesses the senses of sight and hearing. It seems therefore necessary to advance one step in the application of the doctrine of legal presumption, and to lay it down as a rule that one who is struck by a moving train, which was plainly visible from the point he occupied, when it became his duty to stop, look, and listen, must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger. A line of well-considered cases leads fairly up to this conclusion.' Myers *v.* Railway, 24 Atl. 747, 150 Pa. 386."

There are numerous other cases in this state announcing the same rule as is indicated by the foregoing quotations. Walker *v.* Railroad, 193 Mo. 453, 92 S. W. 83; Stepp *v.* Railroad, 85 Mo. 229; Mackowik *v.* Railroad, 94 S. W. 256, 196 Mo. 550; Hixson *v.* Railroad, 80 Mo. 340; Kelley *v.* Railroad, 88 Mo. 534; Lenix *v.* Railroad, 76 Mo. 86; Harlan *v.* Railroad, 64 Mo. 480; Zimmerman *v.* Railroad, 71 Mo. 476. Learned counsel for respondents makes a very strong presentation upon his theory of this cause, and undertakes to distinguish the cases herein referred to from the case at bar. It is earnestly insisted by respondent that the deceased, Mrs. Stotler, had a right, under the facts developed at the trial of this cause, to presume that the defendants were obeying the ordinances of the town of Laddonia, and were not operating the train at a speed in excess provided by such ordinances. Therefore contributory negligence, under the circumstances, should not be attributed to her. In responding to this

contention, it is sufficient to say that the recent case of Green *v.* Railway Company, 192 Mo. 131, 90 S. W. 805, furnishes a complete answer. In that case it will be observed that the train was being operated at a rate of speed in excess of the provisions of the ordinances of the town of Pacific. It was insisted by counsel in that cause, as is contended in the case at bar, that the deceased had the right to invoke the presumption that the train was not running in violation of such ordinances, and the case of Hutchinson *v.* Railroad, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710, was cited and relied upon by counsel as maintaining that doctrine. Valliant, J., speaking for the court, very clearly draws the distinction between the cases, and he thus answered the contention of the respondent in that case: "The facts in this case are very different from those in Hutchinson *v.* Railroad, 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710, to which we are referred. In that case it was after dark in the evening. The deceased heard the whistle and saw the headlight of the engine about half a mile distant, when she started across the tracks. If the engine had been running within the six-mile speed limit she should have had ample time to cross, even pausing as she did to pick up a scarf she had dropped. The court held that, in the absence of proof that she knew or had reason to apprehend to the contrary, she had a right to presume that the engineer was observing the ordinance, and to regulate her movements accordingly. But the accident we are now discussing did not occur at night. It occurred at 9 o'clock in the morning, and the plaintiff's witnesses say that they saw that the engine was running at a high rate of speed. There was not one of them shown to be more competent to judge of the speed than the deceased. The only difference in that respect between them and her was that they looked, and she did not. If one sees, or has reason to believe, that the engine is running in violation of the speed ordinance, he has no right to risk his life on a presumption that the ordinance is being observed. There is in this case no ground on which to construct a rational presumption that the deceased trusted that the engineer was obeying the ordinance. There is no evidence on which we can base a finding that she saw the engine at all until in the moment of peril. It was imminently dangerously close when she stepped on the track. All the eyewitnesses say she was coming fast. She put her foot over the rail, and in that instant the engine struck her. She was probably in a hurry to overtake her friends, who had gone on ahead, and she was possibly in a state of nervous excitement at having to pass so close to the front of the throbbing freight engine; but, however that may be, and whatsoever the cause, she forgot to look at the danger into which she was running."

So it may be said in this cause, applying the same ruling as was employed in the Green Case, that this accident occurred in broad daylight, and that numerous witnesses testified for the plaintiff

that they saw that the engine was running at a high rate of speed, and it is apparent that Mrs. Stotler, when in from 40 to 60 feet of the main track, if she looked and saw the engine approaching, was just as competent to judge of the speed, and even more so, located as she was, than any of the witnesses who testified in her behalf. The testimony simply shows that she was driving the horse in a buggy, with the top down, in a trot, and that she never checked the speed, and there seemed to be no checking of it until she was on the track and struck by the engine. The testimony of the only eyewitness to this accident rather indicates that she never looked one way or the other in respect to seeing the approach of an engine. While this testimony is of a negative character, he says that he was looking at her, and that he did not see her turn her head to look at all, and did not see her make any stop or check the speed of her horse. We take it that the care and caution that is required of a traveler in crossing a railroad track simply means practical and common-sense prudence, before undertaking to cross a dangerous place; and, confronted with the manner in which Mrs. Stotler drove upon this track, it would be doing violence to the meaning of the terms "prudence and caution" to say that, if she saw that train approaching, as it did approach, this crossing, at a very rapid rate, she was exercising any prudence or caution whatever, under the conditions confronting her, to undertake to hurriedly drive across the track in front of a rapidly approaching engine. As was said by Judge Valliant, in the Green Case: "There is in this case no ground on which to construct a rational presumption that the deceased trusted that the engineer was obeying the ordinance." As before stated, she never stopped, and in our opinion the ordinances fixing the rate of speed, or the rate of speed at which the engine was being operated, never entered her mind. If she saw this engine approaching this crossing when she was from 40 to 50 feet of the main track, common practical prudence and caution would certainly have dictated the waiting of only a few seconds for the engine to pass, and this accident would have been avoided.

We are unwilling to say, under the conditions confronting Mrs. Stotler—an engine approaching the crossing at a very high rate of speed, which was just as apparent to her as it was to the witnesses who undertook to fix the rate of speed—that it was the exercise of even the most ordinary care and prudence to undertake, under the circumstances, while rushing along to cross the track, by mental process or reasoning, to figure out how long it would take the engine to reach the crossing. Under the facts disclosed in this record, the exercise of ordinary practical prudence and caution would have required her to stop until the engine passed.

We have indicated our views upon the controlling propositions

disclosed by the record, which renders it unnecessary to discuss the other complaints urged by the appellants.

Entertaining the views as herein expressed, it results in the conclusion that the judgment of the trial court should be reversed, and it is so ordered. All concur.

BIRMINGHAM RY., LIGHT & POWER CO. *v.* JONES.

(Supreme Court of Alabama, Nov. 21, 1907. Rehearing Denied Dec. 19, 1907.)

[45 So. Rep. 177.]

Street Railroads—Duty to Trespassers—Lookout—Infants.*—The general principle that a railroad company owes to a trespasser no duty to keep a lookout for him, which is of equal force, as to adults and infants, except where infants are enticed upon the track, applies to railroads in city streets as well as elsewhere, in the absence of certain conditions, known to the railway company, making it a duty to lookout for persons liable to be on the tracks at certain points.

Same—Railroads Not Flush with Surface of Street—Right of Public to Use of Roadbed.†—Where a railway is built in a street or public road, so as to be incorporated with and become a part of the roadbed of the street or road, and the rails are level with the surface, the

*For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to Powers *v.* St. Louis Transit Co. (Mo.), 23 R. R. R. 251, 46 Am. & Eng. R. Cas., N. S., 251.

For all the preceding authorities in this series on the question of the care required of those in charge of street cars to avoid injuring children in streets, see foot-notes appended to Camden Interstate Ry. Co. *v.* Broom (C. C. A.), 22 R. R. R. 11, 45 Am. & Eng. R. Cas., N. S., 11.

For the authorities in this series on the subject of the care due from those in charge of trains or street cars to licensees or trespassers on railroad tracks, see foot-notes appended to Teakle *v.* San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

†For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to Olney *v.* Omaha, etc., Ry. Co. (Neb.), 23 R. R. R. 300, 46 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to McCarthy *v.* Consolidated Ry. Co. (Conn.), 22 R. R. R. 685, 45 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to United Rys. & Elec. Co. *v.* Watkins (Md.), 22 R. R. R. 641, 45 Am. & Eng. R. Cas., N. S., 641; foot-notes appended to Indianapolis T. & T. Co. *v.* Kidd (Ind.), 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366; Weinberger *v.* North Jersey St. Ry. Co. (N. J.), 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351.

public has not only the right to cross it, but also to pass along and use it as any other part of the street or road, being careful to look for and avoid approaching trains or cars, and the operatives of trains and cars on such a railway are under a duty to keep a lookout for persons exercising their right; but where the railway is not level with the surface of the street or road, but the rails are placed on ties laid on the surface of the highway, the public has no more right to use it than if it were not in a street or road at all.

Railroads—Injuries to Persons on Track—"Trespasser."‡—While a person may, for the purpose of merely crossing a railroad, do so without becoming a trespasser, if he lingers on it, or walks along it at a place where he is not entitled to walk, he is a trespasser, and the company owes him no duty to keep a lookout for him.

Street Railroads—Operation—Duty to Keep Lookout—Persons Rightfully on Track.*—It is the common-law duty of a motorman running a street car in a populous town or city to keep a lookout for persons rightfully on the track and liable to be run over by the cars.

Same—Actions for Injuries—Actionable Negligence.—Even though a street railway company owes the duty to keep a lookout for persons rightfully on the track, if it owed no such duty to a plaintiff because she was a trespasser, no action would lie; actionable negligence being a failure to discharge a legal duty to the person injured.

Same—Trespasser.‡—Where a street railway company's tracks were not level with the surface of the street, but its rails were placed on ties laid on the surface of the street, a child 16 months old, sitting or lying on the end of one of the ties is a trespasser.

Same—Duty to Trespassers—Lookout.‡—If, in view of the locality where a street car is running and all the attending circumstances, those in control of the movement of the car have no reason to apprehend that there may likely be a person on the track in front of it, they are under no duty to a trespasser who may be there, until they actually discover his presence, but if from the locality or circumstances known to the company there is reason to apprehend that the track may not be clear from human beings, then it is the duty of the employees to keep a lookout; hence, in an action against a street railway company for injuries to a trespasser, it is error to instruct that if defendant's motorman was not keeping a proper and diligent lookout, and the accident occurred within the limits of an incorporated city, the motorman would be guilty of negligence.

‡See extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

For the authorities in this series on the questions, who are, and are not, licensees on railroad tracks or premises, see foot-notes appended to Teakle *v.* San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 49 Am. & Eng. R. Cas., N. S., 18; foot-notes appended to Keller *v.* Erie R. Co. (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599.

*See foot-note on preceding page.

Birmingham Ry., etc., Co. *v.* Jones

Same—Actions for Injuries—Questions for Jury.—In an action against a street railway company for injuries to a trespasser, whether the locality and surrounding circumstances were such as to make it the duty of defendant's employees to keep a lookout held for the jury.

Negligence—Contributory Negligence—Infants.§—A child 16 months old cannot be guilty of contributory negligence.

Street Railroads—Injuries to Persons on Track—Injuries Avoidable Notwithstanding Contributory Negligence.*—If a motorman discovers the presence of a trespasser on the track in time to avoid injury, the company is liable for his failure to use the means and appliances at his command to prevent the injury, irrespective of whether it was the motorman's duty to keep a lookout for the person injured or not.

Same—Instructions—Applicability to Evidence.—A charge embracing that principle would not be appropriate, in the absence of testimony showing that the motorman was looking ahead, if the conditions were not such as to make it his duty to keep a lookout for plaintiff, but, if the duty to keep the lookout existed, it would be proper, irrespective of other circumstances; hence, where the question of duty to keep the lookout is for the jury, such an instruction is proper.

Same—Actions for Injuries—Questions for Jury.—In an action against a street railway for injuries to a trespasser, whether the motorman discovered the plaintiff in time to prevent the accident, and whether he promptly used the means at his command to prevent it, held for the jury.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Annie May Jones, by her next friend, against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Tillman, Grubb, Bradley & Morrow, for appellant.
John W. Tomlinson, for appellee.

DENSON, J. Third avenue, sometimes called "Georgia Avenue," is a public street in the city of Woodlawn; its course being east and west. Along this avenue the defendant has constructed and operates a street railway by permission of the municipality. The width of the avenue does not appear from the evidence; but it does appear that the defendant's roadbed and track are located

§For the authorities in this series on the question whether young children can be chargeable with contributory negligence, see foot-notes appended to Coy *v.* Missouri Pac. Ry. Co. (Kan.), 24 R. R. R. 555, 47 Am. & Eng. R. Cas., N. S., 555; foot-notes appended to Denver City Tramway Co. *v.* Nicholas (Colo.), 22 R. R. R. 523, 45 Am. & Eng. R. Cas., N. S., 523; Chambers *v.* Milner Coal & Ry. Co. (Ala.), 20 R. R. R. 277, 43 Am. & Eng. R. Cas., N. S., 277.

*See foot-note on page 781.

on the south side of it the track being only about 10 feet from the property line on that side. The ties are laid on the surface of the earth, and the rails are laid on them. In other words, the railway is not so constructed as to become a part of the avenue, suitable for being traveled along or over with vehicles; but the evidence tends to show that pedestrians frequently pass along it. The travel in vehicles is confined to that part of the street which lies north of the railway. Sixty-Fifth and Sixty-Sixth streets, two other public thoroughfares in Woodlawn, intersect Third avenue, and consequently defendant's railway. At the Sixty-Fifth street crossing the defendant's cars make regular stops to take on or put off passengers, but do not make such stops at the Sixty-Sixth street crossing, which is east of Sixty-Fifth, and nearer to Gate City. The injury complained of in this case was inflicted on the plaintiff, an infant only 16 months old, while she was sitting on the end of a cross-tie, or between the ends of two cross-ties, on the defendant's railway at a point between the two crossings mentioned, by one of defendant's electric cars going east, at about 2 o'clock in the afternoon of a bright day. The fender of the car struck the child on her head, causing a very serious injury. The accident occurred about 50 yards or steps east from the Sixty-Fifth street crossing, and the evidence tends to show that it was immediately in front of the dwelling of the parents of the plaintiff, which was located at the corner of Third avenue and Sixty-Sixth street and on the north side of the avenue. Plaintiff's mother had dressed her in a white garment and put her in the charge of an older child, on the veranda, and had gone into the house to attend to domestic duties. The older child, it seems, either left the baby or did not control her, and she crawled (she could not walk), out into the avenue and onto the track, and was in the position above indicated when she was struck by the passing car. The track is straight from Sixty-Fifth street to and even beyond the point where the accident occurred, and there were no obstructions to prevent a motorman, occupying the proper place on the car, while operating the car, from seeing an obstruction at that point from Sixty-Fifth street; and the evidence warrants the conclusion that, if the motorman had been maintaining a lookout ahead, he would have discovered the plaintiff in time to prevent the injury. The evidence tended to show that the motorman was on the front platform of the car, but did not positively show what he was doing before the accident occurred. However, witness Lankston testified that he (witness) was sitting on the rear seat of the car (on the side of the track on which the child was struck), looking out of the window at his left; that he saw an object on the track about 25 or 30 feet ahead of the car, but did not realize it was a child until the car was something like 10 or 15 feet from it, and at that time the "current was thrown on to stop the car" (he felt it); that the child was sitting with her face towards the car, and the rear end of the car was 6 or 8 feet beyond

the point where the child was struck when the car stopped. Witness J. H. Woods testified that he was sitting on the second seat from the front, on the left side of the car (the side of the track the child was on when injured), and saw the child when the car was 25 or 30 feet from her; that after he saw the child he could not tell the exact moment the brakes were applied, but that "it looked like" they stopped the car as soon as they could get it under control; that when he first saw the child in front of the car he did not immediately feel the brakes being put on, but that "some time elapsed" before that was done; that the car was not going very fast, on account of the fact that it had stopped at Sixty-Fifth street, fifty yards from the place of the accident. He testified further, that "everything was excited—that he himself was excited, and that he could not say how long it was from the moment he saw the child until the brakes were applied, but that it was some little interval." The evidence also affords an inference that the car could have been suddenly stopped. The defendant offered no evidence in respect to the accident—gave no explanation of it whatever. From a judgment in favor of the plaintiff for $2,400, the defendant took this appeal.

There are many grounds in the assignment of errors, but they all converge at two points; the main question here presented for determination being whether or not the motorman owed plaintiff the duty, under the circumstances, to keep a lookout ahead for her. The court, in its oral charge, among other things, instructed the jury as follows: "If the jury should find from the evidence that at and before the time of the accident the defendant's motorman was not keeping a proper and diligent lookout, and if the jury find that the accident occurred within the limits of an incorporated town, the motorman would be guilty of negligence; and if the jury further find from the evidence that such negligence was the proximate cause of the injuries alleged to have been inflicted on on the plaintiff then the plaintiff would be entitled to recover." The defendant reserved an exception to this charge, and here challenges its correctness. The argument of appellant's counsel against the charge proceeds upon the theory that the plaintiff was a trespasser on the defendant's track at the time the injury occurred, and that, notwithstanding the evidence affords a just inference that the motorman, had he been keeping a lookout ahead, would have discovered plaintiff in time to avoid injuring her, yet on account of plaintiff's being a trespasser he owed her no such duty. As a general proposition it must be conceded that a railroad company owes to a trespasser no duty to keep a lookout for him. It must also be conceded that this doctrine, according to our own decisions and to the weight of authority elsewhere, applies with equal force to adults and infants, except in cases where infants are enticed upon the track. N., C. & St. L. Ry. *v.*

Harris, 142 Ala. 249, 37 South. 794, 110 Am. St. Rep. 29; Chambers' Case, 143 Ala. 255, 39 South. 170; Highland, etc., Co. v. Robbins, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153, and cases there referred to; Moorer's Case, 116 Ala. 642, 22 South. 900; Jefferson's Case, 116 Ala. 294, 22 South. 546, 38 L. R. A. 458, 67 Am. St. Rep. 116; Bush's Case, 122 Ala. 470, 26 South. 168; L. S., etc., R. Co. v. Clark, 41 Ill. App. 343; Morrisey's Case, 126 Mass. 377, 30 Am. Rep. 686; Williams' Case, 69 Miss. 631, 12 South. 957; Crystal's Case, 105 N. Y. 164, 11 N. E. 380; Foley's Case, 78 Hun, 248, 28 N. Y. Supp. 816; Goodman's Case, 116 Ky. 900, 77 S. W. 174, 63 L. R. A. 657; Parish's Case, 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364; McMullen's Case, 132 Pa. 107, 19 Atl. 27, 19 Am. St. Rep. 591; Woodruff's Case (C. C.) 47 Fed. 689; 3 Elliott on Railroads, §§ 1255, 1257, 1259. It must be further conceded that, in the case of Glass v. M. & C. R. R. Co., 94 Ala. 581, 10 South. 215, this court has said: "This doctrine applies as well to densely populated neighborhoods in the country, and the streets of a town or city, as to the solitudes of the plains or forests, with this exception: Where a railway is built in a street or public road, in such way as to be incorporated with and to become a part of the roadbed of the street or road, as where the ties and rails of the railway are imbedded in the street or road, so that, as nearly as practicable, the top of the rail is visible and the same level as the surface of the roadway —a manner of construction illustrated in what are known as street railways—where, in other words, it is manifest that the railway is intended to be, and to be used as, a part of the street or road in which it is embodied, the public has not only the right to cross it, but also the right to pass along and use it as any other part of the street or road, being careful to look for and avoid approaching trains or cars; and in view of this right in the public, operatives of trains and cars on such railway are under a duty to keep a lookout for persons exercising it. But where the railway is not thus incorporated with the street or road, the public has no more right to use it than if it were not in a street or road at all."

It must further be conceded that the manner of construction of the track in the present case does not bring it within the exception stated in the Glass Case. Further, the plaintiff was not walking along the track, nor attempting to cross it. She was sitting or lying on it. The case of South. & N. R. R. Co. v. Donovan, 84 Ala. 141, 4 South. 142, was one in which an infant was injured by the railroad while he was walking across the track within the limits of the city of Birmingham, and the railroad insisted that it was under no duty to keep a lookout for him, because, as it contended, he was a trespasser. The court held bad a plea setting up the facts, because it failed to aver that the employees of defendant kept a lookout; and in the opinion said:

"We cannot say it was not the duty of the persons who were managing the train, under the circumstances of this case, to keep a vigilant lookout even for trespassers, and that a failure to do so would not be negligence. The decisions of this court support the contrary conclusion, at least where the injury occurs in the streets of a city, town, or village. What the rule would be where a naked trespasser on the track is injured in the open country, or elsewhere, by the failure of a railroad engineer to keep a vigilant lookout, is an open question in this state, upon which we now express no opinion." It is distinctly held in the Glass Case that one who merely walks across a railroad is not a trespasser, but that one who walks along a railroad track not constructed so as to bring it within the exception therein stated is a trespasser, though the line is located in a town or city; and the court says of the Donovan Case: "And the principle declared in Donovan's Case must be confined to persons exercising the undoubted, but qualified, right to cross a railroad track." Glass' Case, 94 Ala. 589, 10 South. 215. While the Glass Case has been to some extent qualified in Nave's Case, 96 Ala. 264, 11 South. 391, in respect to certain conditions, known to the railroad, which would make it the duty of the company to look out for persons liable to be on the track at certain points, it still stands as authority, except where such conditions are shown to exist, and has been reaffirmed in the later case of Montgomery's Executors *v.* A. G. S. R. R. Co., 97 Ala. 305, 12 South. 170. So it is the settled doctrine of this court that, while a person may, for the purpose of merely crossing a railroad, do so without becoming a trespasser, yet if he lingers on it, or walks along it at a place where he is not entitled to walk, he is a trespasser, and the company owes him no duty to keep a lookout for him. Chewning's Case, 93 Ala. 24, 9 South. 459; Stringer's Case, 99 Ala. 397, 13 South. 75; Tennessee, etc., Co. *v.* Hansford, 125 Ala. 349, 28 South. 45, 82 Am. St. Rep. 241.

The contention of the appellant in no wise conflicts with the further doctrine, which is settled by this court, that it is the common-law duty of a motorman, running a street car in a populous town or city, to keep a lookout for persons rightfully on the track and liable to be run over by the cars. Anniston, etc., Co. *v.* Elwell, 144 Ala. 317, 42 South. 45; Blanton's Case, 84 Ala. 154, 4 South. 621; Daniel's Case, 122 Ala. 366, 25 South. 197. But, actionable negligence being a failure to discharge a legal duty to the person injured, if there is no duty there is no negligence. And even if the defendant owed the duty to keep a lookout for persons rightfully on the track, but owed none to the plaintiff because she was a trespasser, no action will lie, for the duty must be to the person injured. So. Ry. Co. *v.* Williams, 143 Ala. 212, 38 South. 1013; O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677. On the facts of the case and the principles of law

adverted to, we cannot escape the conclusion that the plaintiff was a trespasser on the road. While this is true, it will not do to lay down, as an invariable rule applicable to all cases, that a railroad company owes no duty to trespassers. Conduct which might, under one set of circumstances, show that all ordinary and reasonable care and diligence had been observed, might, under a different set of circumstances, be insufficient to show an observance of such care and diligence. Such rule could mean no more than this: Taking the locality where the car is running, and all the attendant circumstances, if those in control of the movement of the car have no reason to apprehend that there may likely be a human being on the track in front of it, they are under no duty to one who in fact may be there, until they have actually discovered that he is there. But if, from the locality or attending circumstances known to the company, there is reason to apprehend that the track in front of the car may not be clear of human beings, then it would seem it is the duty of the employees of the company to keep a lookout ahead of the car. This, it seems to us, is a safe and conservative judicial principle—one which will conserve human life and at the same time place no burden on the company. It is also in keeping with the modification of the Glass Case as made in Nave's Case, 96 Ala. 264, 11 South. 391, which has been several times followed. Haley's Case, 113 Ala. 640, 21 South. 357; Highland, etc., Co. *v.* Robbins, 124 Ala. 113, 118, 27 South. 422, 82 Am. St. Rep. 153.

Are there any tendencies in the evidence in the case in judgment which may serve to bring it within the rule above enunciated? We think there are—not conclusive, it is true, but sufficiently so to make it a jury question, albeit from what appears in the record it does not seem that the cause was tried with respect to this principle. The evidence tends to show that the neighborhood was thickly settled, that pedestrians frequently passed along the track, and that children frequently played in the street at that point, and sometimes on that track. This, if known to the company, we feel warranted in saying, makes it a question for determination by the jury as to whether or not a reasonably prudent person, engaged in running an electric car along the street at that point, would apprehend that the track there might not be clear of human beings, especially of children; and if the jury should find that he would be so apprehensive, then as a matter of law it would be negligence on his part not to keep a lookout at that point, and if this negligence proximately contributed to plaintiff's injury the jury would be warranted in returning a verdict for the plaintiff. Of course, what has been said must be understood as having been said without regard to the doctrine of contributory negligence; this doctrine, on account of the tender age of the plaintiff, having no foundation in the case. Brawley's Case, 83 Ala. 371, 3 South. 555, 3 Am. St. Rep. 751. But it does not follow

that the oral charge is free from error. On the contrary, we must for obvious reasons hold it erroneous. The effect of the charge is that, although the plaintiff was a trespasser, the defendant owed her the duty to keep a lookout ahead merely because the car was being run on a street within the corporate limits of a city. We have seen that such is not the law, and the giving of the charge must work a reversal of the cause. Carrington's Case, 88 Ala. 472, 476, 6 South. 910; Highland, etc., R. Co. *v.* Robbins, 124 Ala. 113, 27 South. 422.

The other point in the case may also be discussed in connection with a part of the oral charge of the court which is presented for review. The court instructed the jury: "If the jury find from the evidence that the motorman discovered the child on the track, and with a knowledge of its danger negligently failed to use all the appliances at command to avert any injury to the plaintiff, and if said injury proximately resulted therefrom, there may be a recovery by the plaintiff on that ground." Whether the motorman was under any duty to keep a lookout for the plaintiff or not, if he discovered plaintiff's peril in time to prevent injuring her, and he negligently failed to use the means or appliances at his command to prevent the injury, and the injury resulted from such failure, by all the authorities liability for the injury would be fixed on the defendant. C. of G. R. Co. *v.* Lamb, 124 Ala. 172, 26 South. 969; C. or G. R. Co. *v.* Foshee, 125 Ala. 199, 27 South. 1006; Birmingham, etc., Co. *v.* Brantley, 141 Ala. 614, 37 South. 698. We do not understand that appellant's counsel challenge the principle of law embodied in the instruction, nor, indeed, the form in which it is stated (the charge should have hypothesized discovery of peril in time to avert it); but their contention is "predicated on the principle that the motorman was under no duty to keep a lookout for plaintiff, and if so, no presumption existed that he saw the plaintiff in time to have avoided injuring her, from the fact that by keeping a diligent lookout he could have done so"; that "this presumption accompanies only the duty to keep a lookout, or evidence that the motorman was looking ahead"; and that in the instant case "there was no evidence that the motorman was looking ahead." In respect to this contention, in the light of the discussion which has preceded, we remark that the principle of law invoked by the charge becomes material only in the event the jury should find that the conditions at the point where the injury occurred were not such as made it the duty of the motorman to keep a lookout for the plaintiff, because if the duty existed, and there was a failure in this respect, the liability of the defendant would be fixed, irrespective of the principle invoked by the charge under consideration. If, however, the jury should find that the conditions were not such as made it the duty of the motorman to keep the lookout, then according to our former adjudications there

must, to render the charge appropriate, be some evidence tending to show the motorman was looking ahead. In Nave's Case, 96 Ala. 264, 11 South. 391, the company owed the person injured no duty to lookout for him, and the evidence did not show the engineer was looking ahead along the track, and it was decided "that, inasmuch as it was not the duty of the engineer to keep a lookout for a person on the track, the fact that he could have seen him if he had looked did not authorize the inference that he did look and see him." And in Southern Railway Co. *v.* Bush, 122 Ala. 470, 487, 26 South. 168, 173, in respect to this question, the court, speaking through Tyson, J., said: "Certainly the facts that the road was straight for a long distance, the view of the track unobstructed, and the engineer was in his seat looking ahead along the track, and there was nothing to prevent him from seeing a person on the track a few hundred feet ahead, are relevant and admissible for the purpose of proving that he did see such person, and may properly be submitted to the jury on this issue; and, while no presumption arises from these facts that the engineer did see the person on the track, yet this may be inferred from these facts by the jury, whose province alone it is to decide the weight to be given to facts legally in evidence and their effect on an issue which they are admitted to prove." And in Alabama, etc., R. R. Co. *v.* Moorer, 116 Ala. 642, 646, 22 South. 900, 901, a case for the negligent killing of a boy eight years old, the court said: "The plaintiff examined several witnesses, some of whom saw the boy when he was on by the defendant's engine. They saw him, however, only a few moments before he was overtaken. He was running down the track, and threw his head around to see the approaching train. None of them knew or could testify as to when the engineer saw the boy. They did testify to facts tending to show when he might have seen him—evidence competent and important to be considered under the counts charging simple negligence, if the other evidence was conflicting as to whether he exercised due diligence, after the discovery of the boy's peril, to prevent the injury."

Under the evidence disclosed by the record, whether the motorman discovered the plaintiff in time to prevent her injury by the prompt use of means at his command, and, if he did so discover her, whether he promptly used such means, are questions for determination by the jury under proper instructions from the court. Therefore the charge is not open to the criticism made by the appellant. What has been said will furnish a sufficient guide for the court on another trial, without discussing the various charges in detail.

For the error pointed out, the judgment appealed from will be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

WILMINGTON CITY RY. CO. *v.* WHITE.

(Supreme Court of Delaware, June 18, 1907.)

[66 Atl. Rep. 1009.]

Negligence—Question for Court and Jury.—In an action for injuries, it is for the court to say whether there is any evidence from which negligence or contributory negligence can be reasonably and legitimately inferred; but it is for the jury to say whether, from the evidence adduced, when submitted to them, any negligence, and whose, ought to be inferred.

Street Railroads—Injuries to Traveler—Negligence—Contributory Negligence—Question for Jury.—In an action for injuries to the driver of a coach in a funeral procession, caused by a collision with a street railway car, evidence held to require submission of the question of defendant's negligence and of plaintiff's contributory negligence to the jury.

Same—Evidence—Custom—Pleading.*—In an action for injuries to the driver of a coach in a funeral procession, caused by a collision with a street car, evidence that for a long time prior thereto it had been the custom of the operators of street cars as a matter of privilege to permit funeral processions to pass without a break in the line, and that plaintiff, with knowledge of such custom, relied thereon at the time he crossed the track in front of the car, was admissible, though not pleaded.

Customs and Usages—Distinction.—Usage, in its most extensive meaning, includes custom; but in its narrower signification it refers to a general habit, mode, or course of procedure.

Same—Pleading.—A general custom need not be pleaded, but a custom obtaining only in a particular district or neighborhood must be.

Street Railroads—Injuries to Travelers—Evidence—Pleading.—In an action for injuries to the driver of a coach in a funeral procession by a collision with a street car, evidence as to the condition of travel on the street for two hours, including the time of the accident, was admissible, though not pleaded.

Pleading—Counts.—It is no objection that plaintiff's cause of action be stated in several counts, if the privilege is fairly and reasonably exercised.

Pleading—Matters to Be Proved.—The pleadings in a case are not evidence of the matters pleaded.

Appeal—Prejudice.—A count in a declaration on which issue has been taken, but respecting which no evidence is introduced, is harm-

*See generally, extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

less to defendant on the merits of the case, though not stricken out on motion.

Error to Superior Court, New Castle County.

Action by James R. White against the Wilmington City Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and BOYCE, JJ.

Walter H. Hayes and *Ward & Gray*, for plaintiff in error.
Levin Irving Handy and *Herbert L. Rice*, for defendant in error.

BOYCE, J. This action was brought in the Superior Court for New Castle county by James R. White, the plaintiff below, against the Wilmington City Railroad Company, the defendant below, for the recovery of damages for personal injuries alleged to have been occasioned by the negligence of the defendant company. The plaintiff, in his declaration, containing, as amended, three counts, alleged that the defendant company negligently and carelessly (1) omitted to give reasonable notice of the approach of one of its cars in time to avoid a collision with a coach driven by the plaintiff; (2) so operated the car as to collide with the coach, whereby the plaintiff was hurled from the coach to the surface of the street and injured; and (3) used the car with defective brakes, and by reason thereof the collision and injury occurred. The injuries complained of were caused by the collision of a car of the defendant company with a coach driven by the plaintiff in a funeral procession, at the intersection of Tatnall street and West Fourth street, in the city of Wilmington, between the hours of 2 and 3, on the afternoon of April 27, A. D. 1904. The plaintiff's coach was the fifth in order behind the hearse, and the procession was moving slowly and northward along Tatnall street, with four or five feet of space between the horses of one coach and the rear of the coach ahead. The car was approaching Tatnall street on the eastward-bound track of the defendant company on West Fourth street. West street is west of, next to, and parallel with Tatnall street. It is conceded that the distance between Tatnall and West streets is about 190 feet, and that the fall or downgrade on Fourth street from West to Tatnall is 10 9-10 feet in each 100 feet of the distance between them. The day upon which the accident occurred was said to be drizzly and rainy. Tatnall street, from building line, was shown to be 49 feet wide, and Fourth street 82 feet 6 inches wide. The defendant company has two tracks laid on Fourth street.

The plaintiff testified that he was an experienced driver; that he was sitting on the outside, and on a level with the top of his

coach; that he first saw the car when he passed the building line on the southerly side of Fourth street; that the car was then stopped with the hind part at the crossing on the east side of West street; that he then looked towards Market street and saw a car coming west; that he did not watch the car at West street; that just before he reached the corner on the southerly side of Fourth street the driver ahead of him held out his hand to that part of the hill and signaled to the car to stay there, judging from the way he held his hand; that after he glanced at the car he did not look at it again until he heard the ringing of the bell, when his front wheel was on the first rail of the east-bound track and his horses had cleared the track; that the car was from 8 to 15 feet away from him; that he first heard the bell just before the car hit him. The speed of the car, coming down the hill, was said to be from 8 to 12 miles an hour. The plaintiff, against objections and exceptions, was permitted to introduce evidence of a custom or usage of the defendant company to stop its cars to allow a funeral procession to pass across its tracks without interruption or break in the line; that he knew of the existence of the custom; and that between 2 and 3 o'clock in the afternoon the wagon travel on Tatnall street, at and near Fourth street, was heavy. There was some conflict of testimony respecting facts material to the issue.

When the plaintiff had rested his case, counsel for the defendant moved: "First. That the third count of the plaintiff's declaration, as to defective machinery and appliances, be struck out, because there had been no evidence to support it; or, second, that as to the third count a nonsuit be entered for the lack of evidence to support it; or, third, that the jury be instructed to find a verdict for the defendant on the third count." The court overruled each of said motions, and exceptions were noted. The defendant having closed its testimony, counsel for the plaintiff abandoned the third count in his declaration. Respecting the said count the court said, in part: "The third count, as to defective machinery is not before the jury and not to be considered by the jury." Counsel for the defendant then requested "the court to give a verdict for the defendant on the remaining counts." The request was not granted, and the plaintiff had a verdict. To the refusal of the court to give binding instructions and to certain rulings as to the admission of testimony the defendant took a bill of exceptions; and its counsel have assigned eleven errors.

The first of these is: "The court below erred in refusing to instruct the jury to find a verdict for the defendant, because, as it was contended, the evidence disclosed (1) that the plaintiff was guilty of contributory negligence, and (2) that there was not any breach of duty on the part of the motorman in charge of the car which the defendant owed to the plaintiff." It was conceded

that the court below stated correct propositions of law in that part of its charge to the jury as follows: "While the speed of trolley cars is not limited by law, yet in approaching such crossing it was the duty of the motorman to make the descent at such reasonable speed as not to put the car beyond his control; and as the danger of collision increased, if he saw or could see the danger, it was his duty to use all the means in his power to check or stop the car. Price *v.* Warner Co., 1 Pennewill (Del.) 472, 42 Atl. 699. This does not impose upon the motorman, however, an impossibility. If he in fact did all that he could to control the speed of the car, under the circumstances, the company would not be liable. It was, however, equally the duty of the plaintiff, the driver of the team, to use all reasonable care and precaution to prevent the accident. We will not attempt to specify the precise acts of precaution which are necessary to be done or omitted by one in the management of an electric car, or by one in the management of or driving a wagon approaching a railway crossing. Such acts must depend upon the circumstances of each case, and the degree of care required differs in different cases. The general rule is that the person in the management of the car and the person driving the wagon are bound equally to the reasonable use of their sight and hearing for the prevention of accidents, and to the exercise of such reasonable caution as an ordinarily careful and prudent person would exercise under the circumstances of a particular case. A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If the approach of the railway to the crossing be down a steep grade, whereby it is more difficult to stop or check a car, the driver of the vehicle should exercise more care than might be necessary where the approach of the railway was by a slight decline, upon a level, or by an ascending grade. If, as he approaches the crossing, his line of vision is unobstructed, he is bound to look for approaching cars in time (if possible) to avoid collision with them, and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence. Brown *v.* Railway Co., 1 Pennewill (Del.), 336, 40 Atl. 936; Snyder *v.* People's Ry., 4 Pennewill (Del.), 148, 53 Atl. 433. Both the company and the driver of the team, the plaintiff in this case, were required to use such reasonable care as the circumstances demanded; an increase of care on the part of both being required when there is an increase of danger. The right of each one using the highway must be exercised with due regard to the right of the other, and in a reasonable and careful manner, so as not unreasonably or unnecessarily to abridge or interfere with the right of the other. Some of the witnesses have testified that they heard the car bell ring coming down the hill; others, that they did not hear it ring. The testimony of the former witnesses is, of course,

of more weight than that of those who merely say that they did not hear the bell ring, which might reasonably be attributed to a want of attention at the time. Such negative testimony is usually of little value. Q. A. R. R. Co. *v.* Reed (Del. Sup.), 59 Atl. 863."

It was contended that these instructions, applied to the facts in the case, entitled the defendant to the peremptory instruction requested. In every action for negligence two things are requisite to entitle the plaintiff to a recovery. (1) Negligence on the part of the defendant; and (2) due care on the part of the plaintiff. In every such action, the question, "Whose negligence was the proximate cause of the injury complained of?" is one which must be determined from the evidence, under all the facts and circumstances of the particular case. It is for the court to say whether there is any evidence from which negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, can be reasonably and legitimately inferred; but it is for the jury to say whether, from the evidence adduced, when submitted to them, any negligence, and whose, ought to be inferred. Queen Anne's R. R. *v.* Reed, 5 Pennewill (Del.) 228, 59 Atl. 860; Creswell *v.* W. & N. R. R. Co., 2 Pennewill (Del.) 210, 43 Atl. 629. Whether the court should (1) submit the case to the jury upon the evidence; or (2) should order a nonsuit when the plaintiff has rested his case, or direct a verdict for the defendant if the plaintiff should decline to take a nonsuit; or (3) should direct a verdict for either the plaintiff or the defendant at the close of the testimony—must depend upon the state of the evidence in the particular case, at each stage thereof. If in the absence of contributory negligence on the part of the plaintiff, there is any evidence of negligence on the part of the defendant upon which the jury can properly find a verdict, or if the conclusion to be drawn therefrom is debatable, or rests in doubt, though the facts are undisputed, or if the evidence is conflicting in regard to any material fact, the case should be submitted to the jury. If the plaintiff fails to produce any evidence of negligence on the part of the defendant, or if, as it has been said, it is manifest as a conclusion of fact or by necessary inference that those acts which the law regards as negligent have not been shown, or if proof of contributory negligence arise out of the testimony of the plaintiff in the first instance, it is the duty of the court to nonsuit the plaintiff. If, notwithstanding proof of the negligence of the defendant, it obviously appears at the close of the testimony that the injury complained of was due to the fault or negligence of the plaintiff, it is the duty of the court to direct a verdict for the defendant. It is quite impossible to lay down any well-defined rule by which to determine whether the question of contributory negligence should be found, as a conclusion of law, upon the facts presented; and the court will not decide the question without the aid of the jury, if the conclusion to be drawn therefrom is

doubtful and uncertain. Queen Anne's R. R. *v.* Reed, *supra*. The court, in submitting this case to the jury, charged them upon the law of negligence as follows "The gist of this action is negligence, and the burden of proving the negligence of the defendant company rests upon the plaintiff in this case. If there was no negligence on the part of the company, your verdict should be for the defendant. Even if there was negligence on the part of the defendant, yet if the negligence of the plaintiff contributed to the accident, or was the proximate cause thereof, your verdict should be for the defendant; for he would, in that case, be guilty of contributory negligence. If you believe that at the time of the accident each party was using such reasonable care as the circumstances demanded, then the collision was simply an unavoidable accident, and the plaintiff could not recover."

The third, fourth, fifth, sixth, and seventh assignments of error were considered together. They each related to the admission of evidence on behalf of the plaintiff, against objections and exceptions, respecting "a custom, general and uniform, established by the defendant company for its trolley cars to stop and allow a funeral procession to pass across its tracks without interruption." The custom was not pleaded, and it was contended that it was not competent to prove it without being pleaded. In overruling the objection the court said: "In the case of Foulke *v.* Wilmington City Railway Company, 5 Pennewill (Del.) 363, 60 Atl. 973, we admitted this same question upon the ground that while there was no duty resting upon the defendant company to stop and allow funeral processions to pass, yet if they had been in the habit of doing it, and thereby induced, on the part of the drivers who were familiar with the custom, the belief that they would stop it entered into the question of the driver's negligence. * * * We do not think it is necessary to be alleged in the declaration." And in their charge to the jury respecting this matter the court further said: "We know of no law requiring a trolley car to stop at the intersection of streets and wait until a funeral procession has passed; nor of any law giving to a funeral procession the right of way over cars or other vehicles or persons properly using a highway of this state. If by courtesy such privilege has been given by trolley cars and by others using the highway, such courtesy imposes no duty upon the person extending the courtesy, nor does it in any manner relieve such person from all reasonable care and precaution in so using the highway as to prevent accident or injury. If you should find from the evidence in this case that the uniform and continuous usage or practice of the defendant company had been to stop its cars at crossings and wait until a funeral procession passed by, and that such usage was known to and relied upon by the driver, the plaintiff in this case, at the time of the accident, we say to you that such method of dealing with the public on the part of the company, and so known to the

driver, may be taken into account by you in estimating the degree of diligence required of the plaintiff in looking out for an approaching car before he crossed the railway track; for in such case he might reasonably presume or infer the continuance of that usage. To justify such presumption, however, such usage must have been uniform and continuous. Even then the failure to observe such usage would not amount to negligence on the part of the defendant company. It would not relieve the driver of reasonable care in making such crossing. He would have no right so to presume, if he actually saw the car coming down upon him, or if by the reasonable use of his senses he might have seen its approach. It may be stated that, as a general rule, no legal right can grow out of mere courtesy, however uniform and long-continued; nor will such courtesy impose a legal obligation upon the person extending it."

We will add that the word "custom" is sometimes used synonymous with "usage," meaning a course of dealing which derives its legal force from assent, express or implied; again, as something which by long usage or judicial sanction has acquired the force of law, and is binding without regard to the question of assent. 29 A. & E. Ency. of Law, 367. Usage, in its most extensive meaning, includes custom; but in its narrower signification it refers to a general habit, mode, or course of procedure, 12 Cyc. 1030. Customs are of two kinds, general and particular. Stimmel *v.* Brown, 7 Houst. (Del.) 219, 30 Atl. 996. A general custom need not be pleaded, but a custom obtaining only in a particular district or neighborhood must be pleaded. Templeman *v.* Biddle, 1 Harr. (Del.) 522. The alleged practice of the defendant company to stop its cars and permit a funeral procession to pass without interruption was not a custom or usage which had the force and effect of a law, binding upon the defendant company. It was a course of conduct, if it existed, in the nature of an accommodation, indulgence, or courtesy, prompted, doubtless, by considerations of respect, and, if known among drivers in funeral processions to exist, it was competent to prove it, though it was not pleaded. In the case of Martin *v.* B. & P. R. R. Co., 2 Marv. 123, 42 Atl. 442, it was held that, where a traveler knows that a flagman is habitually stationed at a crossing, and upon looking finds that the flagman is not at his post giving signals of danger, he has a right to assume that a train is not about to pass. But the absence or negligence of the flagman will not excuse the person about to cross the track from using every reasonable precaution that an ordinarily prudent and careful person would use. It appearing that the plaintiff had knowledge of the existence of the alleged usage or practice on the part of the defendant company, at and before the time of the accident, evidence of such practice was properly admitted, in order that the jury might determine from all the facts and circumstances surrounding

the case, whether the plaintiff was, at the time of the accident, in the exercise of due care and caution. What will constitute negligence or want of due care may depend upon the observance or nonobservance of a usage or practice known to exist under particular circumstances.

The eighth, ninth, and tenth assignments of error were considered together. They each related to the admission of evidence on behalf of the plaintiff, against objections and exceptions, respecting "the condition of travel on Tatnall street, whether said street was much used at its intersection with West Fourth street, on or about the 27th day of April, 1904, between 2 and 4 o'clock in the afternoon." The matter of travel was not pleaded. It was not necessary to do so in order to give evidence of it. As tending to show the necessity for a greater degree of care on the part of the servants of the defendant company at the time and place of the accident, the evidence was competent.

The eleventh assignment of error relates to the action of the court in overruling the said motion made by counsel for the defendant respecting the third count in plaintiff's declaration. In practice, a variety of counts often occurs in respect of the same cause of action; the law not having set any limits to the discretion of the pleader, in this respect, if fairly and reasonably exercised. Steph. on Plead. 258. The pleadings in a case are not evidence of the matters pleaded. And a count in a declaration upon which issue has been taken and respecting which no evidence is introduced at the trial is harmless to the defendant upon the merits of the case. In this case, the count was adondoned by the plaintiff, and the jury were instructed by the court to disregard the count altogether. For any reason shown, the court did not err in overruling the said several motions respecting the said count. After a careful examination and consideration of the record and briefs of counsel, and in view of the conflict of testimony with regard to some material facts in issue, it is not obvious that there was such an entire absence of negligence on the part of the servants of the defendant company on the one hand, or that there was such contributory negligence on the part of the plaintiff on the other, as that it was the duty of the court to direct a verdict for the defendant.

Under all the circumstances surrounding this case, it is the opinion of this court that the question as to whose negligence, if any, was the proximate cause of the accident, was properly submitted to the jury under the instructions given by the court below; and the judgment of the court below it therefore affirmed.

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Admissibility of evidence that for a long time prior to accident it had been the custom of the operators of street cars, as a matter of privilege, to permit funeral processions to pass without a break in the line, and that plaintiff relied thereon at the time he crossed track in front of the car, where such custom was not pleaded. Wilmington City Ry. Co. *v.* White (Del.), 791.

In action for injuries to driver of another vehicle by collision with street car, evidence as to condition of travel on the street for two hours, including time of accident, was admissible, though not pleaded. Wilmington City Ry. Co. *v.* White (Del.), 791.

That train's movements for four or five years prior to accident had been the same as at that time was admissible. Minot *v.* Boston & M. R. R. (N. H.), 512.

Last clear chance doctrine, application of where collision between street car and buggy. Smith *v.* Connecticut Ry. & L. Co. (Conn.), 201.

"Last clear chance" rule did not apply where collision between street car and other vehicle. Doherty *v.* Des Moines City Ry. Co. (Iowa), 477.

ACCIDENTS ON TRACK.—Continued.
Negligence of street railway was question for jury. Wilmington City Ry. Co. *v.* White (Del.), 791.
Speed of street car, test as to reasonableness of. Smith *v.* Connecticut Ry. & L. Co. (Conn.), 201.

ACTIONS.
See RAILROADS.

ADVERSE POSSESSION.
See RIGHT OF WAY.
Right of way was acquired by individuals by prescription as against railroad company. Trustees *v.* Slaughter (Ky.), 351.
Where railroad takes land for its right of way without compensation, it cannot acquire title by adverse possession. Connellsville Gas Coal Co. *v.* Baltimore & O. R. Co. (Pa.), 70.

AGENCY.
See EVIDENCE; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; RAILROADS.

ANIMALS.
See STOCK, INJURIES TO.

APPEAL.
See DAMAGES; PERSONAL INJURIES.

APPLIANCES.
See EMPLOYERS' LIABILITY ACTS; STREET RAILWAYS.

ASSAULTS.
See MASTER AND SERVANT.

BAGGAGE.
Carrier liable for any loss of baggage not caused by act of God or public enemy. Wolf *v.* Grand Rapids, etc., Ry. (Mich.), 79.
Checking baggage, immaterial that carrier's transfer agent violated his authority in not requiring production of ticket, on issue of carrier's liability for loss of baggage. Wolf *v.* Grand Rapids, etc., Ry. (Mich.), 79.

Damages.
Special damages for delay not recoverable unless carrier had notice of special circumstances at time of receiving baggage. Strange *v.* Atlantic Coast Line R. Co. (S. Car.), 150.
Special damages, measure of was injury to special business attributable to the delay, including expense and loss of time incurred in search for the baggage. Strange *v.* Atlantic Coast Line R. Co. (S. Car.), 150.

Evidence.
Owner may testify that he contracted with carrier for transportation of his baggage to certain point without producing his check. Strange *v.* Atlantic Coast Line R. Co. (S. Car.), 150.
Testimony of carrier's transfer agent as sufficient proof that baggage came into carrier's custody. Wolf *v.* Grand Rapids, etc., Ry. (Mich.), 79.
Evidence supported finding that certain carriers had entered into arrangement which rendered them jointly liable for loss of passenger's baggage. Wolf *v.* Grand Rapids, etc., Ry. (Mich.) 79.

BAGGAGE.—Continued.
Liability of carrier for loss not changed because passenger declared in case instead of assumpsit. Wolf *v.* Grand Rapids, etc., Ry. (Mich.), 79.

CARRIERS.
See CONNECTING CARRIERS; CONSTITUTIONAL LAW; INTERSTATE COMMERCE.

CARRIERS OF LIVE STOCK.

Degree of Care.
Mule dying in transit without marks upon it by which cause of death could be ascertained, carrier not liable on account of. Illinois Cent. R. Co. *v.* Davis & Levy (Miss.), 109.

Limiting Liability.
Risks arising from loading and want of bedding, validity of stipulation releasing railroad from liability on account of. St. Louis S. W. Ry. Co. *v.* Butler (Ark.), 606.
Risks arising from loading live stock and want of bedding, effect of assumption of by shipper. St. Louis S. W. Ry. Co. *v.* Butler (Ark.), 606.

CARRIERS OF PASSENGERS.
See MASTER AND SERVANT; TICKETS AND FARES.

Accompanying Passengers.
Degree of care in starting train due person trying to place his wife's baggage aboard. Chesapeake & O. Ry. Co. *v.* Fortune (Va.), 255.
Not error to permit person injured while on carrier's premises to assist his wife to board train, to testify that when attempting to put her baggage aboard, he believed the train would remain standing until his wife could get in the car, and until he could get her baggage on. Chesapeake & O. Ry. Co. *v.* Fortune (Va.), 255.
Right of person attempting to put his wife's baggage on train to assume that train would remain standing a reasonable time to enable passengers and baggage to be put aboard. Chesapeake & O. Ry. Co. *v.* Fortune (Va.), 255.

Assisting Passengers.
Degree of care required of railroad employee voluntarily undertaking to help passenger on train. St. Louis, etc., Ry. Co. *v.* Green (Ark.), 671.
Duty to assist passenger to alight. Horne *v.* Southern Ry. (S. Car.), 316.
Duty to help passenger on train did not appear from the evidence. St. Louis, etc., Ry. Co. *v.* Green (Ark.) 687.
Assumption of risk of riding on platform or running board of street car. Gregory *v.* Elmira, etc., R. Co. (N. Y.), 302.
Assumption of risks by passenger riding on running board of crowded street car. Cramer *v.* Brooklyn Heights R. Co. (N. Y.), 251.

Collisions.
Carrier was liable for injury to its passenger, caused by negligent mismanagement of work car, resulting in a collision with the passenger's street car, even if the work car and the railway

CARRIERS OF PASSENGERS.—Continued.

were under control of another company. Chaffe *v.* Consolidated Ry. Co. (Mass.), 706.

Street railway is liable for injuries resulting from such a condition of its tracks as permits passing cars to come in contact with each other. Staples *v.* Rhode Island Sub. Ry. Co. (R. I.), 315.

Conductor's authority to permit passengers to ride upon engine. Illinois Cent. R. Co. *v.* Jennings (Ill.), 91.

Contributory Negligence.

Alighting from moving train by direction of conductor. Holden *v.* Great Northern Ry. Co. (Minn.), 675.

Alighting from moving train by direction of train porter, question for jury. St. Louis, etc., Ry. Co. *v.* Leamons (Ark.), 744.

Alighting from moving train when told by brakeman to hurry up. Purvis *v.* Buffalo, etc., R. Co. (Pa.), 748.

Carrier was not liable for plaintiff's injuries, under N. Car. Revisal, 1905, § 2628, providing that a railroad shall not be liable for injuries sustained by passenger while on car platform, in violation of carrier's printed regulations posted in cars. Shaw *v.* Seaboard Air Line Ry. (N. Car.), 120.

Degree of care required of passenger. Pomroy *v.* Bangor & A. R. Co. (Me.), 123.

Girl under 14 years of age injured in consequence of negligence of conductor in failing to prevent her from alighting from moving street car, after being carried beyond her known destination, it was error to instruct that she could recover, even though she was negligent in acting as she did. Kruger *v.* Omaha, etc., Ry. Co. (Neb.), 260.

Going upon platform of moving car. Shaw *v.* Seaboard Air Line Ry. (N. Car.), 120.

It is not contributory negligence as a matter of law for a passenger to ride on the running board of a crowded street car. Cramer *v.* Brooklyn Heights R. Co. (N. Y.), 251.

Riding in caboose by direction of conductor. Illinois Cent. R. Co. *v.* Jennings (Ill.), 91.

Riding on running board of crowded street car. Cramer *v.* Brooklyn Heights R. Co. (N. Y.), 251.

Standing up in car before train stops at station, when there is a conspicuous notice in car to warn passengers against such conduct. Abelson *v.* St. Louis, etc., Ry. Co. (Ark.), 731.

Damages.

Failure to discharge passenger at her destination, recovery for should have been limited to such loss of time, illness and inconvenience suffered as was the natural and reasonable result of being carried by her station. Louisville & N. R. Co. *v.* Gaddie (Ky.), 331.

Mental suffering of passenger caused by mere verbal abuse of station agent, carrier not liable for. St. Louis, etc., Ry. Co. *v.* Taylor (Ark.), 738.

Degree of Care.

All that human vigilance and foresight can do, under the circumstances, considering character and mode of conveyance, required of carrier. Pomroy *v.* Bangor & A. R. Co. (Me.), 123.

Care due passenger struck by car on other track while riding on running board of crowded street car. Gregory *v.* Elmira, etc., R. Co. (N. Y.), 302.

CARRIERS OF PASSENGERS.—Continued.

Care due person with ticket when attempting to board rapidly moving train. Illinois Cent. R. Co. *v.* Cotter (Ky.), 141.

Care required in management of trains. St. Louis, etc., Ry. Co. *v.* Green (Ark.), 687.

Care required of conductor to prevent young girl, carried beyond her known destination, from alighting from moving street car. Kruger *v.* Omaha, etc., Ry. Co. (Neb.), 260.

Care required of motorman to prevent collisions between cars, instruction was erroneous because of the use of the word "very" before "careful, prudent and experienced conductors and motormen." Connell *v.* Seattle, etc., Ry. Co. (Wash.), 701.

Carrier must exercise such diligence for safety of passengers as nature of its business allows. Chaffee *v.* Consolidated Ry. Co. (Mass.), 706.

Ordinary care under the circumstances must be exercised by carrier of passengers at all times, and such rule applies to all matters which pertain to the business of a carrier of passengers. Pomroy *v.* Bangor & A. R. Co. (Me.), 123.

Special care to prevent passengers on running board of street car from being struck by structure near track, when required of those in charge of street car. Cramer *v.* Brooklyn Heights R. Co. (N. Y.), 251.

Street car passenger injured by reason of derailment of her car, exercise of what degree of care required to be shown by carrier to escape liability. O'Gara *v.* St. Louis Transit Co. (Mo.), 333.

Street railways. O'Gara *v.* St. Louis Transit Co. (Mo.), 333.

Suburban electric railway's contract duty to carry passenger safely to her destination and to so conduct the operation of its cars as not to injure her, protected her only against any willful act or negligence on part of its employees. Prospert *v.* Rhode Island Suburban Ry. Co. (R. I.), 113.

Discharging Passengers.

Duty to announce station and afford passenger sufficient time and opportunity to alight. Brooks *v.* Philadelphia & R. Ry. Co. (Pa.), 683.

Negligence of train porter in directing passenger to alight from moving train was question for jury. St. Louis, etc., Ry. Co. *v.* Leamons (Ark.), 744.

Negligence was question for jury. Brooks *v.* Philadelphia & R. Ry. Co. (Pa.), 683.

Ejection.

In action for death of passenger expelled from train at flag station on a stormy night, for failure to produce his ticket, where he was found dead, apparently having been killed by a locomotive, whether the servants of the carrier were guilty of negligence, and whether deceased exercised due care were questions for the jury. Tilburg *v.* Northern Ry. Co. (Pa.), 325.

Quarantine officer causing passenger to leave train, railroad was not liable on account of, although its conductor pointed him out to such officer, and did not interfere to prevent passenger's expulsion. Baldwin *v.* Seaboard Air Line Ry. Co. (Ga.), 97.

Subsequent injuries proximately due to expulsion of passenger at dangerous time or place, liability of carrier for. Tilburg *v.* Northern Cent. Ry. Co. (Pa.), 325.

CARRIERS OF PASSENGERS.—Continued.

Evidence.

Carrier could not show that some of injured passenger's party alighted without accident. Marryman *v.* Chicago G. W. Ry. Co. (Iowa), 94.

In action for failure to discharge a passenger at her destination, evidence that defendant's conductor did not know of any other train following him was inadmissible as a basis for an argument that the conductor should have run his train back to plaintiff's station and let her off there. Louisville & N. R. Co. *v.* Gaddie (Ky.), 331.

Flagman was not negligent in his attempt to prevent plaintiff from being injured, so as to make railroad liable for his injury, caused by his falling from train, which he was trying to board while it was moving rapidly. Illinois Cent. R. Co. *v.* Cotter (Ky.), 141.

Liability for injury to young girl, resulting from failure of conductor to exercise degree of care required of him to prevent her from alighting from moving street car after being carried beyond her known destination. Kruger *v.* Omaha, etc., Ry. Co. (Neb.), 260.

Nonsuit was properly entered where it appeared that electric controller of summer car blew out, and passenger was found lying on ground about fifteen feet back from its rear end, and there was no evidence to show how she came there. Green *v.* Pittsburgh, etc., Ry. Co. (Pa.), 687.

Person hanging on rapidly moving train in attempting to board it could not complain that signal cord was out of order, preventing trainmen from stopping train before he fell from it. Illinois Cent. R. Co. *v.* Cotter (Ky.), 141.

Presumption of Negligence.

Collision between street cars. Chaffe *v.* Consolidated Ry. Co. (Mass.), 706; Connell *v.* Seattle, etc., Ry. Co. (Wash.), 701.

Prima facie case established by proof that plaintiff was a passenger and was injured by derailment of her street car caused by a brick on track. O'Gara *v.* St. Louis Transit Co. (Mo.), 333.

Question for jury, in action for injury to passenger sustained while he was on running board, whether motorman was negligent in running past the fence at high speed, and in failing to see the beam or to appreciate the danger. Cramer *v.* Brooklyn Heights R. Co. (N. Y.), 251.

Receiving Passengers.

Not negligent to start car while passenger is stepping from its platform into car. Birmingham, etc., Co. *v.* Hawkins (Ala.), 689.

Snowstorm causing stalling of suburban electric car and passenger and her infant exposed to cold for 11½ hours, conductor was under no obligation to take steps before he did to find shelter for her outside of car. Prospert *v.* Rhode Island Suburban Ry. Co. (R. I.), 113.

Street car passenger injured by derailment of her car, resulting from malicious act of boy in putting brick on track, which should have been discovered in time by motorman, liability of carrier. O'Gara *v.* St. Louis Transit Co. (Mo.), 333.

Warn and Instruct.

Carrier was liable for injury sustained by passenger in alighting

CARRIERS OF PASSENGERS.—Continued.

from street car, which she believed was stationary; the conductor having failed to warn her, though he knew her danger, or, by the exercise of ordinary care, should have known of it; and he being bound to know that she followed him for the purpose of alighting. Blue Grass Traction Co. *v.* Skillman (Ky.), 680.

Who Are Passengers.

Person with ticket attempting to board rapidly moving train. Illinois Cent. R. *v.* Cotter (Ky.), 141.

Relation of carrier and passenger, sufficiency of evidence of existence of. Chaffe *v.* Consolidated Ry. Co. (Mass.), 706.

CHILDREN.

Assumption that as to four year old child the curb line of city street is the danger line in crossing street, in action against street railway for running over child. Cornovski *v.* St. Louis Transit Co. (Mo.), 37.

Burden of proving child non sui juris. Simkoff *v.* Lehigh Valley R. Co. (N. Y.), 484.

Contributory Negligence.

Degree of care required of boy of 13 in crossing railroad track. Gehring *v.* Atlantic City R. Co. (N. J.), 575.

Degree of care required of child for its own protection. Simkoff *v.* Lehigh Valley R. Co. (N. Y.), 484.

Effect of that of child too young to be chargeable in law with contributory negligence. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.

Of parents of four year old child, in allowing it to escape to street car track, whether their circumstances of life were to be considered by jury in determining. Cornovski *v.* St. Louis Transit Co. (Mo.), 37.

Damages.

Elements of damages recoverable by parents for death of child, under Utah Rev. St., 1898, § 2912. Rogers *v.* Rio Grande W. Ry. Co. (Utah.), 567.

Instruction was sufficient to submit to jury the question of causal connection between negligence of defendant and the death of the child, struck by street car, though it did not use the expression "proximate cause." Cornovski *v.* St. Louis Transit Co. (Mo.), 37.

Negligence in one seeing child in dangerous position not to take into account the fact that it is a child, and regulate his conduct accordingly. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.

Right to presume that child will do what is necessary to avoid impending danger. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.

COMMON CARRIERS.

Constitutionality of S. Car. act, Feb. 23, 1903. p. 81, § 2, requiring common carriers to adjust and pay every claim for loss or damage to an intrastate shipment within forty days after filing of claim. Seaboard Air Line Ry. *v.* Seegers (U. S.), 147.

Damages.

Delay in delivering freight, what damages may be recovered for. Louisville & N. R. Co. *v.* Mink (Ky.), 135.

Expenses incurred on trip to point of destination to look after delayed shipment. Southern Ry. Co. *v.* Coleman (Ala.), 153.

COMMON CARRIERS.—Continued.

Loss from inability to fill contract for lumber resulting from delay in transporting machinery for saw mill, recovery could not be had on account of, in absence of evidence that carrier was notified of existence of contract. Louisville & N. R. Co. *v.* Mink (Ky.), 135.

Measure of damages where the period a public cotton gin was stopped in consequence of the failure of carrier to promptly transport and deliver part of machinery thereof was so short that the gin had no rental value. Southern Ry. Co. *v.* Coleman (Ala.), 153.

Owner of delayed machinery was entitled to nominal damages only, the estimate of what he might have earned by operating the cotton gin for which such machinery was intended, had the shipment been promptly delivered by the carrier, being speculative. Southern Ry. Co. *v.* Coleman (Ala.), 153.

Proof that carrier's agent at destination of shipment did not locate the car in which it was does not authorize exemplary damages for delay in delivery of shipment. Southern Ry. Co. *v.* Coleman (Ala.), 153.

Degree of Care.

Nature and extent of carrier's liability. Louisville & N. Ry. Co. *v.* Warfield & Lee (Ga.), 345.

Delay.

Aggrieved party, under statute imposing penalty for delay in transportation. Cardwell *v.* North Carolina R. Co. (N. Car.), 89.

Notice of urgency of shipment, it was not enough that the agent with whom the first contract of shipment was made knew thereof; there having been no delay in the first shipment, but the agent with whom the second contract of shipment was made must have been informed of the special circumstances to render carrier liable. Louisville & N. R. Co. *v.* Mink (Ky.), 135.

Penalty for delay in transportation, constitutionality of statute imposing. Cardwell *v.* North Carolina R. Co. (N. Car.), 89.

Delivery by Carrier.

Demand for payment of charges for a former shipment and refusal to deliver freight unless such demand was complied with rendered the withholding of the freight unlawful, and precluded any inquiry into the merits of the other demand; and the carrier was liable for the value of the use of the shipment for the time it was unlawfully withheld. Atchinson, etc., Ry. Co. *v.* Bourdett (Kan.), 321.

Evidence.

Plaintiff, in action by consignee against carrier for loss of 4 bags out of a shipment of 30 bags of rice, may testify that he had bought 30 bags of rice of W. without producing the written order and acceptance admitted to be in existence. Charles *v.* Atlantic Coast Line R. Co. (S. Car.) 130.

Rates, admissibility of evidence to show reasonableness of. Halliday Milling Co. *v.* Louisiana, etc., R. Co. (Ark.), 310.

Testimony of rate clerk of railroad commission as to what would be reasonable freight charges, admissibility. Halliday Milling Co. *v.* Louisiana, etc., R. Co. (Ark.), 310.

Limiting Liability.

Express contract essential. Central of Georgia Ry. Co. *v.* City Mills Co. (Ga.), 103.

COMMON CARRIERS.—Continued.

Instruction was calculated to leave jury to infer that, although shipper had deliberately adopted the conditions of a regular bill of lading as part of contract, yet, if its agent did not understand or have in mind a certain condition at the time of shipment, it would not be part of the contract. Central of Georgia Ry. Co. *v.* City Mills Co. (Ga.), 103.

Notice of claims for damages against carrier, validity of stipulation in bill of lading requiring it to be given. Liquid Carbonic Co. *v.* Norfolk & W. Ry. Co. (Va.), 383.

Validity of contract for transportation of cattle providing that no suit should be maintained on it after a certain time. St. Louis S. W. Ry. Co. *v.* Butler (Ark.), 606.

Notice to consignee of arrival of freight, presumption that it would have been given, according to custom. Jonesville Mfg. Co. *v.* Southern Ry. (S. Car.), 116.

Particular acts of negligence, necessity of alleging in action against carrier for injuries to freight. Louisville & N. Ry. Co. *v.* Warfield & Lee (Ga.), 345.

Specific allegations of negligence may be treated as surplusage, in action against carrier for breach of duty to safely transport freight. Louisville & N. Ry. Co. *v.* Warfield & Lee (Ga.), 345.

Station agent's authority after his resignation, estoppel of carrier to question. Louisville & N. R. Co. *v.* Mink (Ky.), 135.

Whether the duty a common carrier, a railroad corporation, owes to the public is materially and injuriously affected by the contract obligations of the corporation to individuals cannot be arbitrarily determined by the corporation itself. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.

CONNECTING CARRIERS.

Duty of carrier to accept freight tendered by another carrier. Andrus *v.* Columbia, etc., Co. (Wash.), 752.

Evidence.

Freight bill indorsed, "4 sacks short," was relevant for purpose of showing that four bags out of shipment were lost while in possession of terminal carrier. Charles *v.* Atlantic Coast Line R. Co. (S. Car.), 130.

Form of receipt required by S. Car. Code, 1902, § 2176, making initial carrier liable for loss of freight unless it produces receipt from connecting carrier. Jonesville Mfg. Co. *v.* Southern Ry. (S. Car.), 116.

Presumption that goods were damaged while in possession of terminal carrier. Cooper *v.* Seaboard Air Line Ry. (S. Car.), 128.

Prima facie showing of loss of freight while in hands of terminal carrier, how made out. Charles *v.* Atlantic Coast Line R. Co. (S. Car.), 130.

CONSTITUTIONAL LAW.

See COMMON CARRIERS; EMPLOYERS' LIABILITY ACTS; INTERSTATE COMMERCE; TAXATION.

Constitutionality of certain North Carolina penal statute providing, among other things, that any overcharge by a transportation company shall be returned within 60 days after demand. Efland *v.* Southern Ry. Co. (N. Car.), 693.

Wis. Laws, 1905, ch. 1, amending Wis. Rev. St., 1898, § 4229, is invalid so far as it authorizes an action against a railroad for unpaid annual license fees, which by reason of the expiration of six years were barred, since such act was deprivation of property. State *v.* Chicago & N. W. Ry. Co. (Wis.), 532.

CONTRACTS.
See RAILROADS.

CONTRIBUTORY NEGLIGENCE.
See ACCIDENTS ON TRACK; CHILDREN; CROSSINGS; DEATH BY WRONGFUL ACT; LICENSEES; STOCK, INJURIES TO.
Effect of. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.
Effect of absence of plea of. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.
Necessity of alleging and proving freedom from; and defendant's burden of proof. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.
Nonsuit, right of defendant to interpose motion for, though there is no plea of contributory negligence. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.
Plea of essential to entitle defendant to introduce evidence of. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.
Right to make choice as to means to be used to avoid peril; and effect of unwise choice. Louisville & N. R. Co. *v.* Molloy's Adm'x (Ky.), 500.
Whether question for court or jury. Wilmington City Ry. Co. *v.* White (Del.), 791.

CORPORATIONS.
See RAILROADS.

CROSSINGS.
See CHILDREN; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; RAILROADS IN STREETS; STOCK, INJURIES TO; TRESPASSERS.

Contributory Negligence.
Assumption of risk of attempt, at invitation of brakeman, to climb between cars blocking highway. Southern Ry. Co. *v.* Clark (Ky.), 246.
Attempting at night to cross over freight train while it was blocking highway crossing. Southern Ry. Co. *v.* Clark (Ky.), 246.
Attempting to cross in front of train with knowledge that it is approaching and with opportunity to observe its proximity and speed. Drawdy *v.* Atlantic Coast Line R. Co. (S. Car.), 523.
Attempting to cross track when approaching street car is in sight. Wolf *v.* City Ry. Co. (Ore.), 213.
Climbing at night between cars of train blocking highway. Southern Ry. Co. *v.* Clark (Ky.), 246.
Degree of care required of highway traveler. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.
Degree of care which highway traveler's failure to exercise will bar recovery for his injuries, definition of. Chesapeake & O. Ry. Co. *v.* Wilson's Adm'r (Ky.), 238.
Evidence did not show as matter of law that decedent knew or should have known that train was approaching. Louisville & N. R. Co. *v.* Molloy's Adm'x (Ky.), 500.
If person knows, or by exercise of ordinary care and prudence could know, of the approach of a train, it is his duty to allow it to pass before crossing. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.
Last clear chance doctrine. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

CROSSINGS.—Continued.

Of highway traveler prevents recovery, though a prima facie right to recover because of negligence of railroad is shown. Rogers *v.* Rio Grande W. Ry. Co. (Utah), 567.

Person crossing in front of approaching street car is not required to use same degree of care as persons traveling along, on, or across a steam railroad. Spiking *v.* Consolidated Ry. & P. Co. (Utah.), 457.

Question of will ordinarily be left to jury where ordinary train signals were not given and a lookout was not maintained. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Right of person desiring to take street car standing on opposite track to cross intervening track on which was an approaching car. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

Ringing of crossing electric bell, under the circumstances, did not in itself render the attempt to cross the track at such a time contributory negligence. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

Contributory negligence in attempting to cross track immediately in front of engine will prevent recovery, although there was negligent speed in approaching crossing and failure to keep lookout on train. Harris *v.* Southern Ry. Co. (Ga.), 508.

Contributory negligence of deceased in failing to see or heed approach of train precluded recovery for his death, although there was excessive speed and failure to give statutory signals. Chicago, etc., Ry. Co. *v.* Donaldson (C. C. A.), 57.

Contributory negligence of highway traveler and failure to give train signals, liability. Gehring *v.* Atlantic City R. Co. (N. J.), 575.

Defective crossing as cause of accident, insufficiency of evidence of. Chicago, etc., Ry. Co. *v.* Donaldson (C. C. A.), 57.

Degree of care required of railroad to protect travelers at crossings depends upon the facts of each case and is question for jury. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

Evidence.

Customary rate of speed of freight trains, evidence that train in question was not exceeding. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Customary recklessness of deceased in driving across the railroad. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Not error to exclude evidence of engineer and fireman that they thought whistle was sounded. Chesapeake & O. Ry. Co. *v.* Wilson's Adm'r (Ky.), 238.

Flagmen.

Care required of railroad to provide safeguards at crossing must be commensurate with the danger. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

Duty to station at dangerous crossing, even if railroad commission has not required one. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

Where railroad has created an extraordinary danger it is required to exercise extraordinary care, but it is not required by the law that the means adopted should prove effective. Cincinnati, etc., Ry. Co. *v.* Champ. (Ky.), 265.

Gates.

Duty of railroads to maintain gates and person to operate them at grade crossing in street. Boucher *v.* New York, etc., R. Co. (Mass.), 1.

CROSSINGS.—Continued.

Injury to person sustained while climbing between cars of standing freight train, fact that brakeman invited him to cross did not render railroad liable for, the conductor being the representative of the railroad in control of the train. Southern Ry. *v.* Clark (Ky.), 246.

Liability of railroad for injury sustained by person while climbing between cars of freight train standing over highway crossing as affected by fact that brakeman who invited him to do so was without the requisite authority. Southern Ry. Co. *v.* Clark (Ky.), 246.

Lookouts.

Degree of care required of trainmen. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Instruction that railroad was liable if its engineer saw deceased approaching track without looking for train, in time to have prevented it striking her, was proper, as there was evidence showing he could have ascertained such facts by the exercise of ordinary care. Chesapeake & O. Ry. Co. *v.* Wilson's Adm'r (Ky.), 238.

Much-used crossing, what constitutes. Wolf *v.* City Ry. Co. (Ore.), 213.

Mutual duties at crossings of railroad and highway traveler. Cincinnati, etc., Ry. Co. *v.* Champ. (Ky.), 265.

Obstructions.

Mere failure of railroad to cut down trees on right of way in vicinity of grade crossing is not in itself actionable negligence at common law, but may be considered with other circumstances in determining whether it exercised care in operation of cars on a particular occasion. Cowles *v.* New York, etc., R. Co. (Conn.), 72.

Person climbing between cars of train, which had not obstructed crossing for an unreasonable time, was a trespasser, to whom railroad owed no duty until his peril was discovered. Southern Ry. Co. *v.* Clark (Ky.), 246.

Principles of law governing the management of trains propelled by steam power and those propelled by electricity are not identical. Wolf *v.* City Ry. Co. (Ore.), 213.

Risk assumed in attempting at night, at the invitation of a brakeman, to climb between the cars of a train which was obstructing a highway crossing. Southern Ry. Co. *v.* Clark (Ky.), 246.

Signals.

Adequate notice of approach of train must be given. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Failure to give must be shown to have been proximate cause of injury. Rogers *v.* Rio Grande W. R. Co. (Utah), 567.

Failure to give the statutory signals is negligence, even though the railroad has adopted other means of warning, less effective than gates or flagmen. Cincinnati, etc., Ry. Co. *v.* Champ. (Ky.), 265.

Negative testimony as to whether they were given, weight of. Louisville & N. R. Co. *v.* Molloy's Adm'x (Ky.), 500.

Presumption that noncompliance with signal statute was the negligence which caused the death of a person killed by the train. Drawdy *v.* Atlantic Coast Line R. Co. (S. Car.), 523.

Private crossing, liability for injury at because of failure to give proper signals at public crossing. Chesapeake & O. Ry. Co. *v.* Wilson's Adm'r (Ky.), 238.

CROSSINGS.—Continued.

Question for jury whether the safety of the public required that exceptional means, other than the statutory signals, should have been provided to avoid injury to persons using the highway. Cincinnati, etc., Ry. Co. *v.* Champ. (Ky.), 265.

Texas statute is not for protection of person on track near crossing. Missouri, etc., Ry. Co. *v.* Saunders (Tex.), 546.

Speed.

Duty to moderate at certain points in cities and towns. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Duty to regulate at certain kind of crossings so as not to unnecessarily impair the safety of persons using the highway. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

Justification, fact that high rate would render it easier to ascend grade did not constitute. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Rapid running of train over streets or crossings of town, which will render unavailing signals that may have been given of its approach, is evidence of negligence, entitling person injured thereby to recover damages. Cincinnati, etc., Ry. Co. *v.* Commonwealth (Ky.), 616.

Street cars, degree of care required in operating at crossings, whether or not rate of speed has been limited by ordinance or statute. Wolf *v.* City Ry. Co. (Ore.), 213.

Twenty-six or 29 miles an hour by street car at much-used crossing, whether reasonable is question for jury. Wolf *v.* City Ry. Co. (Ore.), 213.

Stop, Look and Listen.

Care must be exercised by highway traveler at proper time and place. Gehring *v.* Atlantic City R. Co. (N. J.), 575.

Person about to cross tracks is only required to observe such degree of care as the situation and surroundings of the crossing may reasonably demand. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

CUSTOM AND USAGE.

Custom, necessity of pleading. Wilmington City Ry Co. *v.* White (Del.), 791.

Usage, definition of. Wilmington City Ry. Co. *v.* White (Del.), 791.

DAMAGES.

See BAGGAGE; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; COMMON CARRIERS; DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

Court of appeals' power to set aside verdict involving punitive damages. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

Gains prevented and losses sustained by reason of breach of contract. Southern Ry. Co. *v.* Coleman (Ala.), 153.

DEATH BY WRONGFUL ACT.

Contributory Negligence.

Presumption of due care on part of person killed by train at crossing, when it ceases to be operative. Rogers *v.* Rio Grande W. Ry. Co. (Utah), 567.

Damages.

Instruction was not objectionable as authorizing consideration of profits arising out of decedent's business. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

DEATH BY WRONGFUL ACT.—Continued.

Judge may refer, in his charge, to decrease in earning capacity resulting from advancing age, etc. Central of Georgia Ry. Co. *v.* Ray (Ga.), 188.

Jurisdiction to review alleged excessive verdict. Chicago & N. W. Ry. Co. *v.* O'Brien (C. C. A.), 234.

Evidence.

Reputation of deceased for care. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

EMINENT DOMAIN.

See FEDERAL JURISDICTION.

Benefits.

Enhancement of market value of land not taken for construction of electric railway is a special, not a general, benefit, though it is common to other property in vicinity. Peoria, etc., Co. *v.* Vance (Ill.), 66.

Instruction that jury should not set off, against damages to land not taken, any general benefits which the land would share in common with other land in the same vicinity, and that only such benefits as were special to the farm, and not common to other farms in the vicinity, could be thus set off was erroneous and prejudicial to the railroad. Peoria, etc., Co. *v.* Vance (Ill.), 66.

Burden of proving condemnation proceedings void where it is sought to enjoin exercise of power of eminent domain by railroad. Beckman *v.* Lincoln & N. W. R. Co. (Neb.), 5.

Extent of railroad's right to exercise power of. Beckman *v.* Lincoln & N. W. R. Co. (Neb.), 5.

Insufficiency of evidence to establish allegation that the railroad in question was not being constructed by and for the corporation which is seeking to obtain the right of way by condemnation proceedings. Beckman *v.* Lincoln &. N. W. R. Co. (Neb.), 5.

Lessor railroad's right to condemn land for purpose of extending its lines for benefit of its lessee. Beckman *v.* Lincoln & N. W. R. Co. (Neb.), 5.

Power of railroad, under certain statute, to condemn lands for the purpose of constructing pieces of roadway in order to straighten and improve the line of road, after it had been permanently located. Cairo, etc., Ry. Co. *v.* Woodyard (Ill.), 592.

Railroad has no authority to take land for the use of another company in the construction of the road of the latter. Beckman *v.* Lincoln & N. W. R. Co. (Neb.), 5.

Where railroad has taken land for its right of way without compensation, the owner may maintain ejectment, but execution under judgment in his favor will be stayed to allow condemnation proceedings. Connelsville Gas Coal Co. *v.* Baltimore & O. R. Co. (Pa.), 70.

EMPLOYERS' LIABILITY ACTS.

Compliance with federal automatic coupler act, so as not to be thereafter subject to conditions of § 8 of such act, on account of subsequent defects occurring to couplers. Missouri Pac. Ry. Co. *v.* Brinkmeier (Kan.), 441.

Constitutionality of statute requiring certain classes of employees to be paid at least once a month. Toledo, etc., R. Co. *v.* Long (Ind.), 168.

EMPLOYERS' LIABILITY ACTS.—Continued.

Constitutionality of Vt. Act. Dec. 10, 1906, p. 114, No. 117, requiring certain classes of corporations to pay their employees each week. Lawrence *v.* Rutland R. Co. (Vt.), 14.

Independent intrastate railroad company, whether it was subject to certain federal safety appliance acts, where it carried property free from a common control, management or arrangement with another carrier for continuous shipments of the articles. United States *v.* Colorado & N. W. R. Co. (C. C. A.), 758.

EVIDENCE.

See ACCIDENTS ON TRACK; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; JUDICIAL NOTICE; MASTER AND SERVANT; NEGLIGENCE; TICKETS AND FARES.

Bad condition of other portions of roof of round house, in action for injuries caused by fall of portion of the roof. Lamb *v.* Philadelphia & R. Ry. Co. (Pa.), 180.

Declarations of agent of two railroad companies was admissible against one of them. Stroud *v.* Columbia, etc., R. Co. (S. Car.), 28.

Medical testimony based on self-serving declarations of injured person. Chicago Union Traction Co. *v.* Giese (Ill.), 195.

Photographs of train wreck in which plaintiff was injured. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

Res Gestæ.

Flagman's declaration, made when he ran back to plaintiff after the train stopped, that he could not stop the train before plaintiff fell from it (when attempting to board it) because the signal cord was out of order. Illinois Cent. R. Co. *v.* Cotter (Ky.), 141.

Rules of railroad should be produced before allowing cross-examination as to their contents. Louisville & N. R. Co. *v.* Taylor's Adm'r (Ky.), 228.

Similar accidents. Finley *v.* Louisville Ry. Co. (Ky.), 183.

FEDERAL JURISDICTION.

Certain Iowa statute does not fix the status of the parties in proceedings to condemn land for railway purposes under the removal act, but the landowner must be deemed the defendant, so far as the right of removal to a Federal circuit court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company. Mason City, etc., R. Co. *v.* Boynton (U. S.), 364.

FELLOW SERVANTS.

See MASTER AND SERVANT.

Engineer was coservant of fireman and employee in charge of switch and semaphore signals. Pearsall *v.* New York, etc., R. Co. (N. Y.), 452.

Fellow servant rule, scope and effect of. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

Inspector of cars is not fellow servant of conductor of train, but is intrusted with a nonassignable duty. Kiley *v.* Rutland R. Co. (Vt.), 415.

Trainmen of different trains. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

FENCES.

See STOCK, INJURIES TO.

Right of railroad to fence its tracks at certain point is a question of law where the facts are undisputed. Gibson *v.* Iowa Cent. Ry. Co. (Iowa), 225.

FIRES SET BY LOCOMOTIVES.

See TRIAL.

Combustible materials, degree of care required of railroad to keep its right of way at points adjoining private property free of. Fireman's Fund Ins. Co. *v.* Northern Pac. Ry. Co. (Wash.), 242.

Combustibles, duty to keep railroad right of way free from. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.

Combustibles on right of way, negligence in allowing them to accumulate. Southern Ry. Co. *v.* Thompson (Ga.), 561.

Contributory Negligence.

Duty to extinguish fire. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.

General issue, railroad cannot show under it that plaintiff was guilty of certain acts of contributory negligence. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.

Degree of care required in equipping, maintaining and operating engine. Southern Ry. Co. *v.* Thompson (Ga.), 561.

Evidence.

Declaration of agent of two railroad companies as to ownership of engine which might have set the fire in question was admissible against one of the companies, it touching matters within the scope of his authority, and being an admission of a fact, and not of a liability. Stroud *v.* Columbia, etc., R. Co. (S. Car.), 28.

General issue, what defendant railroad may prove under. Smith *v.* Ogden & N. W. R. Co. (Utah), 487.

Immaterial whether the engine was properly equipped and properly operated, where grain was burned by fire originating on railway right of way, from sparks escaping from such engine, and spreading to the grain field. Fireman's Fund Ins. Co. *v.* Northern Pac. Ry. Co. (Wash.), 242.

Presumption of negligence. Southern Ry. Co. *v.* Thompson (Ga.), 561.

Railroad is liable for damages to property proximately caused by a fire negligently set out by the running of one of its engines. Southern Ry. Co. *v.* Thompson (Ga.), 561.

Rebuttal of presumption of negligence. Southern Ry. Co. *v.* Thompson (Ga.), 561.

FOREIGN CARS.

See MASTER AND SERVANT.

FRIGHTENING TEAMS.

In action for personal injuries sustained at crossing, if the injuries were caused by fact that plaintiff's horse became frightened and ran into train, the railroad was not liable. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

Removing freight from station and covering it with tin, the glare of which from sunlight frightened a horse and thereby occasioned injury to its driver, did not constitute negligence on part of railroad. Davis *v.* Pennsylvania R. Co. (Pa.), 210.

IMPUTED NEGLIGENCE.
See CHILDREN.

INDEPENDENT CONTRACTORS.
As a general rule, one who employs another to do a piece of work is not liable for the other's collateral negligence unless the relation of master and servant existed between them. St. Louis, etc., R. Co. *v.* Madden (Kan.), 48.
Employer's liability. St. Louis, etc., R. Co. *v.* Madden (Kan.), 48.
Evidence authorized finding that gate tender at crossing was defendant's agent, and not an independent contractor, notwithstanding evidence that the gates were being operated under an arrangement between defendant and one of the other railroads using the crossing, and the other railroad hired and paid the gate tender. Boucher *v.* New York, etc., R. Co. (Mass.), 1.
In leaving cars on siding in question, railroad was exercising its charter powers, which could not be delegated so as to relieve it from responsibility for the negligence of the contractor's employees or defective appliances. Camblin *v.* Philadelphia, etc., R. Co. (Pa.), 160.
Running railroad trains over grade crossing in street is a dangerous business which cannot be delegated to an independent contractor. Boucher *v.* New York, etc., R. Co. (Mass.), 1.
Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party, he will not be permitted to avoid his liability by letting the performance of the work to another. St. Louis, etc., R. Co. *v.* Madden (Kan.), 48.
Work of burning fire guard around railroad right of way could not be delegated by company, under certain Kansas statute. St. Louis, etc., R. Co. *v.* Madden (Kan.), 48.

INJUNCTIONS.
Right to enjoin the running of trains where breach of conditions by railroad of its right of way deed. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.

INTERSTATE COMMERCE.
See EMPLOYERS' LIABILITY ACTS; RAILROADS IN STREETS.
Common-law right of shipper to recover an excess of charges paid carrier for an interstate shipment is not within the exclusive jurisdiction of the federal courts. Halliday Milling Co. *v.* Louisiana, etc., R. Co. (Ark.), 310.
Constitutionality of statute making initial carrier liable for loss of freight unless written receipt from connecting carrier is produced. Jonesville Mfg. Co. *v.* Southern Ry. (S. Car.), 116.
Constitutionality of statute providing penalty for failure of carrier to pay claim for loss of freight within certain time. Charles *v.* Atlantic Coast Line R. Co. (S. Car.), 130.
Sufficiency of complaint in the language of Kirby's Dig. §§ 6621, 6730, for the recovery of an excess over reasonable charges paid to carrier for an interstate shipment, which is also good as stating a common-law cause of action. Halliday Milling Co. *v.* Louisiana, etc., R. Co. (Ark.), 310.
Was not error to admit evidence, under certain allegations of petition, showing that appellant railroad was engaged in interstate commerce. Missouri Pac. Ry. Co. *v.* Brinkmeier (Kan.), 441.

JUDICIAL NOTICE.

Fenders on street cars, court was entitled, under the circumstances, to assume that they were in general use. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

Fenders on street cars, purpose of. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

JURISDICTION.

See FEDERAL JURISDICTION; INTERSTATE COMMERCE.

JURORS.

See TRIAL.

LEASES AND RUNNING POWERS.

See CARRIERS OF PASSENGERS.

Application of certain statutes requiring railroads of a lessor and lessee to be connected. Kaufman *v.* Pittsburg, etc., R. Co. (Pa.), 598.

Power of company to lease its railroad, under certain statutes. Kaufman *v.* Pittsburg, etc., R. Co. (Pa.), 598.

Power of company to lease railroad, which it operates for its own use, for a term of years. Kaufman *v.* Pittsburg, etc., R. Co. (Pa.), 598.

LICENSEES.

See CARRIERS OF PASSENGERS; TRESPASSERS.

Contributory Negligence.

Person on train, by permission, to locate his family, starting to alight from car while it is moving, and thrown under car after being told by brakeman to hurry up. Purvis *v.* Buffalo, etc., R. Co. (Pa.), 748.

One killed while crossing track on a footpath which had been used by the public and the railroad's employees for many years was not a trespasser. Minot *v.* Boston & M. R. R. (N. H.), 512.

Speed of train, ordinarily no rate of is negligence per se where derailment results in injuries to licensees on the train. Chicago & N. W. Ry. Co. *v.* O'Brien (C. C. A.), 234.

Speed of train, question for jury whether it was negligent with respect to express messenger injured by reason of its derailment. Chicago & N. W. Ry. Co. *v.* O'Brien (C. C. A.), 234.

LICENSES.

See TAXATION.

LIMITATIONS OF ACTIONS.

See CONSTITUTIONAL LAW.

LOGGING RAILROADS.

Liability of lumber company where injury to person unconscious on its track was avoidable had a lookout been kept, notwithstanding his negligence in going on track. Sawyer *v.* Roanoke R. & Lumber Co. (N. Car.), 205.

Lookouts, duty to maintain for purpose of avoiding running train over persons on track apparently unconscious. Sawyer *v.* Roanoke R. & Lumber Co. (N. Car.), 205.

MANDAMUS.

Roadbed, in requiring railroad to maintain in safe condition, the quality and quantity of materials and appliances to be used, will be left to the proper discretion of railroad. State *v.* Atlantic Coast Line R. Co. (Fla.), 578.

Scope of writ where railroad is ordered to maintain its roadbed in safe condition. State *v.* Atlantic Coast Line R. Co. (Fla.), 578.

MASTER AND SERVANT.

See EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; INDEPENDENT CONTRACTORS.

Appliances.

Degree of care required of railroad, as an employer, in furnishing machinery. Central of Georgia Ry. Co. *v.* Ray (Ga.), 188.

Duty of railroad to its employee was not necessarily discharged by employing an engine and tender equal in kind to that in general use and reasonably adapted to their proper uses. Central of Georgia Ry. Co. *v.* Ray (Ga.), 188.

Handle of hand car breaking by reason of hidden defect, master was not liable for injury to servant in absence of proof of actual knowledge of defect. Alves *v.* New York, etc., R. Co. (R. I.), 193.

Implied contract of master to provide suitable appliances. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Assaults.

Allegation that defendant knowingly placed in charge of one of its street cars a conductor of bad character, who was drunk and armed with a pistol, and shot a woman passing along the street, while attempting to shoot a passenger who demanded change, sufficiency of. Savannah Electric Co. *v.* Wheeler (Ga.), 708.

Assumption of Risk.

Conductor injured by reason of incompetency of motorman, question for jury. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Latent defects. Cryder *v.* Chicago, etc., Ry. Co. (C. C. A.), 448.

Pole near track causing injury to street railway employee. Finley *v.* Louisville Ry. Co. (Ky.), 183.

Switchman did not assume risk of injuries that might reasonably be expected to result from failure to comply with ordinance prescribing certain precautions to be observed when backing trains at night. Chicago & E. R. Co. *v.* Lawrence (Ind.), 652.

Burden of Proof.

Burden of proof as to negligence was on plaintiff, in action by conductor for injuries from ladder on car giving way as he was climbing it; but there was no presumption that the ladder was sufficient. Kiley *v.* Rutland R. Co. (Vt.), 415.

Dropping of engine rod was not in itself conclusive of negligence of fellow servant of injured employee, nor did it raise a presumption of negligence. Horton *v.* Seaboard A. L. Ry. (N. Car.), 646.

Motorman injured by explosion of controller on car had the burden of showing that it was defective to the knowledge of the railroad company, had it exercised ordinary care. Beebe *v.* St. Louis Transit Co. (Mo.), 632.

MASTER AND SERVANT.—Continued.

On plaintiff to show some act or omission by master that caused or contributed to accident to servant. Pearsall *v.* New York, etc., R. Co. (N. Y.), 452.

Res ipsa loquitur, doctrine of is inapplicable where injury has resulted to motorman from explosion of the controller on car. Beebe *v.* St. Louis Transit Co. (Mo.), 632.

Contributory Negligence.

Conductor's testimony authorized a finding that he was free from contributory negligence in boarding moving train and attempting to climb car ladder, the end of which gave way and caused him to fall. Kiley *v.* Rutland R. Co. (Vt.), 415.

Conductor was not guilty of in going upon coal car, which was being switched, and in relying upon engineer to obey his stop signals, so as to prevent recovery for his death, caused partially by engineer's signals. Pittman *v.* Chicago, etc., R. Co. (Ill.), 435.

Employee is not precluded from recovering for injuries received when in a hazardous position which he had voluntarily and unnecessarily taken, where the hazard did in no way contribute to his injuries. Kiley *v.* Rutland R. Co. (Vt.), 415.

Employees on railroad's outfit cars had right to assume that company would exercise ordinary care to prevent other cars from being run into certain side track. Pugmire *v.* Oregon Short Line R. Co. (Utah), 660.

Inspection of his work place, whether duty of servant to make. Finley *v.* Louisville Ry. Co. (Ky.), 183.

Inspection of train, effect of rule imposing duty upon trainmen, in action for injury to trainman from defect in car ladder. Kiley *v.* Rutland R. Co. (Vt.), 415.

Master's burden of proof. Chicago & E. R. Co. *v.* Lawrence (Ind.), 652.

Question for jury whether enigneer injured by derailment of his train by misplaced switch was guilty of. Pearsall *v.* New York, etc., R. Co. (N. Y.), 452.

Right of section hand to rely upon customary warning being given in case there was any danger from approaching train. Germanus *v.* Lehigh Valley R. Co. (N. J.), 622.

Rule for protection of car inspectors and repairers, failure of car repairer to obey was not excused by presence or consent of another servant of master, who was superior to former, who had agreed to obey the rule. New York, etc., R. Co. *v.* Ropp (Ohio), 171.

Rule for protection of car repairers, failure of injured car repairer to obey was negligence per se. New York, etc., R. Co. *v.* Ropp (Ohio), 171.

Sufficiency of allegation of employee's freedom from. Chicago & E. R. Co. *v.* Lawrence (Ind.), 652.

Degree of Care.

Ordinary care required of master to prevent injury to employee. Pugmire *v.* Oregon Short Line R. Co. (Utah), 660.

Evidence.

Other accident from same cause, evidence of was admissible in action for injury to street car conductor, struck by pole near track while collecting fares. Finley *v.* Louisville Ry. Co. (Ky.), 183.

Testimony of injured employee to show that for two years prior to the accident he had never seen any one inspecting the

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roof, and that during the month before the accident he saw parts of the roof frequently fall to the floor of the round-house. Lamb *v.* Philadelphia & R. Ry. Co. (Pa.), 180.

Fellow Servants.

Duty to furnish employee, ordered to repair engine, competent and careful assistants. Horton *v.* Seaboard A. L. Ry. (N. Car.), 646.

Evidence justified finding that injury to conductor was due to motorman's lack of ordinary skill. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Evidence of single instances of incompetency of fellow servant is inadmissible, but his general reputation as a person deficient in skill in performance of his duties is admissible. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Implied contract of master to use reasonable diligence in employing competent ones. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Knowledge of master of incompetency of fellow servant. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Liability of master on account of incompetency of fellow servant. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Master's liability on account of servant becoming incompetent. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Foreign Cars.

Inspection and repairs, duty of railroad. New York, etc., R. Co. *v.* Hamlin (Ind.), 370.

Sufficiency of complaint in action for injuries to switchman, alleged to have been caused by defective car. New York, etc., R. Co. *v.* Hamlin (Ind.), 370.

Gross negligence, towards those on approaching train, for the engineer and conductor of a work train to permit it to stand on main track on the other train's time, though engineer directed brakeman to flag such other train; the brakeman's failure to do so being also gross negligence. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

Inspection.

Degree of care required of master. Cryder *v.* Chicago, etc., Ry. Co. (C. C. A.), 448.

Effect of rule requiring trainmen to inspect their trains. Kiley *v.* Rutland R. Co. (Vt.), 415.

Latent defect in car ladder, there was no substantial evidence of negligence of railroad or of its inspectors. Cryder *v.* Chicago, etc., Ry. Co. (C. C. A.), 448.

Latent defects, when failure to discover and remove is not negligence. Cryder *v.* Chicago, etc., Ry. Co. (C. C. A.), 448.

Negligence in inspection of car, a round of a ladder of which, on account of the wood into which it was fastened being rotten, gave way, as the conductor was climbing it. Kiley *v.* Rutland R. Co. (Vt.), 415.

Limiting Liability.

Negligence of master causing injury to servant, validity of contract. Pugmire *v.* Oregon Short Line R. Co. (Utah), 660.

Rule requiring car inspectors and repairers to see for themselves that blue flag by day or blue light by night is displayed at each end of car upon which they are working, agreement by servant

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to obey it is not invalid as limiting master's liability for negligence. New York, etc., R. Co. *v.* Ropp (Ohio), 171.

Presumption of negligence on part of master did not arise from fact that car repairer was injured while repairing trucks, which had been removed from under end of cars, by the falling of end of the car, which had been jacked up by other employees and rested upon the jacks. Moit *v.* Illinois Cent. R. Co. (C. C. A.), 176.

Proximate Cause.

Switchman's contributory negligence in attempting to effect a coupling in a dangerous manner, and not the nail in broken beam of the car, was proximate cause of accident. New York, etc., R. Co. *v.* Hamlin (Ind.), 370.

Where conductor riding on coal car was killed through the car being derailed by defective track, that engineer handled the cars negligently did not relieve railroad from liability for its negligence respecting the track. Pittman *v.* Chicago, etc., R. Co. (Ill.), 435.

Rules.

Authority of superior servant to waive. New York, etc., R. Co. *v.* Ropp (Ohio), 171.

Reasonableness of rule requiring car inspectors and repairers to see for themselves that a blue flag by day or a blue light by night is displayed at each end of car or cars upon which they are working. New York, etc., R. Co. *v.* Ropp (Ohio), 171.

Sufficiency of master's rules to protect servant. Pearsall *v.* New York, etc., R. Co. (N. Y.), 452.

Scope of Employment.

Crew of hand car, in negligently overspreading it in going to work to repair track, were engaged in the performance of their duty to their master, so as to render the railroad liable for injury to one of the crew caused by his being thrown from the car. Soderlund *v.* Chicago, etc., Ry. Co. (Minn.), 521.

Foreman of bridge gang's act in throwing water cooler belonging to himself from moving train, whereby pedestrian on right of way was injured. St. Louis S. W. Ry. Co. *v.* Bryant (Ark.), 504.

Street railway's liability for death of woman accidentally shot by its conductor when attempting to shoot a passenger, sufficiency of petition. Savannah Electric Co. *v.* Wheeler (Ga.), 708.

Street railway's liability for tort committed by its conductor. Savannah Electric Co. *v.* Wheeler (Ga.), 708.

Superior officer's ordinary negligence, rule exempting master from liability is limited to cases in which the officer has immediate control or supervision over the servant. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

Switchman was entitled to recover from his master, the railroad company, for injuries received by reason of the negligence of union depot company's servant in operating switch. Floody *v.* Great Northern Ry. Co. (Minn.), 162.

Union depot company's employee's negligence causing injury to railroad company's employee, liability of railroad. Floody *v.* Great Northern Ry. Co. (Minn.), 162.

Warn and Instruct.

Duty of foreman to give customary warning of approach of train

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to section hand is a nonassignable one. Germanus *v.* Lehigh Valley R. Co. (N. J.), 622.

Question for jury, under the circumstances, whether the customary warnings to section hands of the approach of trains were sufficient. Germanus *v.* Lehigh Valley R. Co. (N. J.), 622.

Who Are Employees.

Gate tender at crossing hired and paid by another company. Boucher *v.* New York, etc., R. Co. (Mass.), 1.

Union depot company's servants as employees of railroad company. Floody *v.* Great Northern Ry. Co. (Minn.), 162.

Wife of manager of railroad company's outfit cars permitted by company to accompany her husband and cook for the outfit employees. Pugmire *v.* Oregon Short Line R. Co. (Utah), 660.

Work Place.

Degree of care required of street car company. Finley *v.* Louisville Ry. Co. (Ky.), 183.

Implied contract of master to furnish safe place to work. Cooney *v.* Commonwealth Ave. St. Ry. Co. (Mass.), 627.

Jacking up end of car for purpose of repairing trucks was not part of master's duty of providing safe work place, and was not a nonassignable duty. Moit *v.* Illinois Cent. R. Co. (C. C. A.), 176.

NEGLIGENCE.

See CARRIERS; CHILDREN; CROSSINGS; FIRES SET BY LOCOMOTIVES; INDEPENDENT CONTRACTORS; MASTER AND SERVANT; RAILROADS IN STREETS; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

Actionable negligence, elements of. Chicago Union Traction Co. *v.* Giese (Ill.), 195.

Complaint was sufficient as setting forth cause of action based on violation of ordinance forbidding the running of locomotives backward in nighttime without a light on the rear end. Chicago & E. R. Co. *v.* Lawrence (Ind.), 652.

Concurrent negligence of defendant and third person, liability. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.

Defendant may be liable if his negligence contributes with that of third persons. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.

Evidence.

Res ipsa loquitur, when doctrine of applies. Chicago Union Traction Co. *v.* Giese (Ill.), 195.

That at various times before the accident street cars similar to those in question had been heard and felt to scrape together when passing each other at or near the place of the accident. Staples *v.* Rhode Island Sub. Ry. Co. (R. I.), 315.

Necessity of alleging facts showing. Harris *v.* Southern Ry. Co. (Ga.), 508.

Ordinary care, definition of. Pomroy *v.* Bangor & A. R. Co. (Me.), 123.

Proof of injury by negligence or some other cause is insufficient. Cryder *v.* Chicago, etc., Ry. Co. (C. C. A.), 448.

Whether question for court or jury. Wilmington City Ry. Co. *v.* White (Del.), 791.

NUISANCES.

Grade railroad crossing authorized by state, neither railroad nor municipality is responsible for dangers resulting solely from such a construction, the only duty owing by them to highway travelers being the statutory one of maintaining in safe condition the highway as established. Cowles *v.* New York, etc., R. Co. (Conn.), 72.

Grade railroad crossing cannot lawfully exist unless in pursuance of state authority. Cowles *v.* New York, etc., R. Co. (Conn.), 72.

Public nuisance committed by running trains through town at unsafe speed and without giving crossing signals, what must be proved to show existence of. Cincinnati, etc., Ry. Co. *v.* Commonwealth (Ky.), 616.

Public nuisance committed in running trains through town in an unsafe manner, evidence required an acquittal, though the trains were run at an unreasonable rate of speed. Cincinnati, etc., Ry. Co. *v.* Commonwealth (Ky.), 616.

Speed of train through town and absence of warnings, indictment charged a public nuisance. Cincinnati, etc., Ry. Co. *v.* Commonwealth (Ky.), 616.

NURSING.

See PERSONAL INJURIES.

PENAL STATUTES.

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PERSONAL INJURIES.

Damages.

Confusing instruction as to compensatory damages. Doherty *v.* Des Moines City Ry. Co. (Iowa), 477.

Excessive verdict to be set aside unless remittitur be made. Pomroy *v.* Bangor & A. R. Co. (Me.), 123.

Mental and physical suffering, right to recover for. Owensboro City Ry. Co. *v.* Robertson (Ky.), 735.

Mental anguish and pain suffered while pinioned in train wreck, and in danger of being burned to death. Louisville & N. R. Co. *v.* Brown (Ky.), 426.

Mental pain, there was no error in including the element of in an instruction on subject of damages. St. Louis, etc., Ry. Co. *v.* Leamons (Ark.), 744.

Nursing by members of injured person's family, expense of was not recoverable. Gibney *v.* St. Louis Transit Co. (Mo.), 720.

Province of court of appeals where it is claimed that verdict is excessive. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

$600 as compensatory damages was not excessive. Owensboro City Ry. Co. *v.* Robertson (Ky.), 735.

$3,500 could not be said to be excessive. Connell *v.* Seattle, etc., Ry. Co. (Wash.), 701.

$5,500, whether excessive verdict for loss of leg. Chesapeake & O. Ry. Co. *v.* Fortune (Va.), 255.

$7,500 was not such an excessive verdict as to indicate passion or prejudice, where it appeared that the derailment of her street car resulted in plaintiff's miscarriage and other injuries. O'Gara *v.* St. Louis Transit Co. (Mo.), 333.

$8,500 was not excessive. Cincinnati, etc., Ry. Co. *v.* Champ (Ky.), 265.

$10,000 is an excessive recovery for injury to foot and other parts of plaintiff's body, where the injuries do not appear to be per-

PERSONAL INJURIES.—Continued.
manent, though punitive damages are allowable. Louisville & N. R. Co. *v.* Brown (Ky.), 426.
$30,000 was excessive verdict for injuries to passenger, which consisted of neurasthenia, etc. Gibney *v.* St. Louis Transit Co. (Mo.), 720.

PLEADING.
See ACCIDENTS ON TRACK; CARRIERS; CONTRIBUTORY NEGLIGENCE; CUSTOM AND USAGE; FIRES SET BY LOCOMOTIVES; INTERSTATE COMMERCE; NEGLIGENCE.

PRESCRIPTION.
See ADVERSE POSSESSION.

PRESUMPTIONS.
See DEATH BY WRONGFUL ACT; MASTER AND SERVANT.

PROCESS.
See RAILROADS.

QUO WARRANTO.
See STREET RAILWAYS.

RAILROAD AID.
Certain provision as to notice for election on question of levying tax was complied with when the railroad was in operation between certain points and a depot was constructed as required, though off the main line and on a spur track. Whitney *v.* Chicago, etc., Ry. Co. (Iowa), 62.
Tax was earned when the railroad was in actual operation between the specified points, whatever the financial ability of the railroad company to extend it further. Whitney *v.* Chicago, etc., Ry. Co. (Iowa), 62.
There was no fraud to sustain injunction against collecting taxes voted in aid of construction of the railroad where railroad procured cancellation of illegal excess of bonds before the hearing, and none of the bonds had been negotiated. Whitney *v.* Chicago, etc., Ry. Co. (Iowa), 62.

RAILROADS.
See COMMON CARRIERS; JUDICIAL NOTICE; MANDAMUS; STREET RAILWAYS; TAXATION.
Certain foreign railroad company was transacting business in Maryland, within meaning of certain statute, so as to be liable to suit in any of the courts of the state on any transaction therein. Central of Georgia Ry. Co. *v.* Eichberg (Md.), 356.
Contracts relating to operation of railroads may be specifically enforced. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.
Hurd's Rev. St. 1905, c. 32, §§ 50-58, providing for changing corporate names, places of business, and objects for which corporations were formed, etc., is applicable to railroads. Cairo, etc., Ry. Co. *v.* Woodyard (Ill.), 592.
Service of process, upon what agent of foreign railroad may it be made. Central of Georgia Ry. Co. *v.* Eichberg (Md.), 356.
State's right to regulate public service corporations. England *v.* Southern Ry. Co. (N. Car.), 693.

RAILROADS.—Continued.
Where the subject matter of a contract made by a railroad corporation is not foreign to its lawful purposes, and is not forbidden by statute, and is not otherwise illegal, it will not be nullified by the courts. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.

RAILROADS IN STREETS.
See CROSSINGS; NUISANCES; TRESPASSERS.
Care required of engineer to avoid collisions with other users of streets. Holmes *v.* Missouri Pac. Ry. Co. (Mo.), 551.
Interstate commerce, ordinance requiring railroad to maintain lights at street crossings was not invalid as an interference with. Pittsburg, etc., Ry. Co. *v.* Hartford City (Ind.), 82.
Lights at street crossings, validity of ordinance requiring railroad to maintain. Pittsburg, etc., Ry. Co. *v.* Hartford City (Ind.), 82.
Ordinance requiring railroad to maintain electric lights at street crossings was not invalid as impairing efficiency of headlights on locomotives. Pittsburg, etc., Ry. Co. *v.* Hartford City (Ind.), 82.
Right of public to use of roadbed. Birmingham Ry., etc., Co. *v.* Jones (Ala.), 781.

Signals.
Ky. St., 1903, § 786, confers on municipalities exclusive power to determine by ordinance what signals shall be given therein by trains running through their corporate limits. Cincinnati, etc., Ry. Co. *v.* Commonwealth (Ky.), 616.
Statutory power of town of the sixth class to require certain precautions to be observed in running trains within its limits. Cincinnati, etc., Ry. Co. *v.* Commonwealth (Ky.), 616.

REMOVAL OF CAUSE.
See FEDERAL JURISDICTION.

RIGHT OF WAY.
See ADVERSE POSSESSION; EMINENT DOMAIN; STATIONS AND DEPOTS.
Construction of railroad right of way deed. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.
Railroad acquiring for a right of way land over which individuals exercised and claimed a right of way adverse to and by recognition of the owner is chargeable with notice of the right of the individuals. Trustees *v.* Slaughter (Ky.), 351.
Specific performance by railroad of conditions of its right of way deed, when enforceable. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.

SPECIFIC PERFORMANCE.
See RAILROADS; STATIONS AND DEPOTS.

STATIONS AND DEPOTS.
Constitutionality of Ark. Acts, 1903, p. 303, § 1, requiring railroads to maintain separate waiting rooms for the white and African races and keep them heated and supplied with drinking water, etc. State *v.* St. Louis & S. F. R. Co. (Ark.), 110.
Contract of railroad to maintain spur track and depot at certain place, when equity may enforce specific performance of. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.
Indictment charging violation of Ark. Acts, 1903, p. 303, § 2, in

STATIONS AND DEPOTS.—Continued.

failing to keep waiting room heated and supplied with drinking water, was void for uncertainty. State *v.* St. Louis & S. F. R. Co. (Ark.), 110.

Indictment charging violation of Ark. Acts, 1903, p. 303, § 1, in neglecting to keep waiting room at certain station properly heated and supplied with drinking water, but failing to designate whether the waiting room intended for the white or the one intended for the African race was meant, was void for uncertainty. State *v.* St. Louis & S. F. R. Co. (Ark.), 110.

Lighting platforms, degree of care required of railroads. Marryman *v.* Chicago G. W. Ry. Co. (Iowa), 94.

Lights for platforms, sufficency of a question for jury. Marryman *v.* Chicago G. W. Ry. Co. (Iowa), 94.

Maintenance of depot and spur track at point near hotel of grantor of railroad's right of way, when conditions of right of way deed will be specifically enforced. Taylor *v.* Florida, etc., Ry. Co. (Fla.), 289.

Platform steps, duty to provide. Marryman *v.* Chicago G. W. Ry. Co. (Iowa), 94.

Platforms and lights, degree of care with respect to due passenger alighting at intermediate station. Marryman *v.* Chicago G. W. Ry. Co. (Iowa), 94.

STOCK, INJURIES TO.

Backing the locomotive at high rate of speed was evidence of negligence. Miller *v.* Chicago, etc., Ry. Co. (S. Car.), 32.

Burden of showing that trespassing animal was killed by train, and that the killing was negligent, is on plaintiff. Gibson *v.* Iowa Cent. Ry. Co. (Iowa), 225.

Contributory Negligence.

Recovery for injury to horse was precluded because plaintiff's own conduct, in preventing railroad's employees from repairing its right of way fence, and continuing to use his land as a pasture with knowledge that such fence was defective, proximately contributed to bring about the condition which resulted in the injury. Baltimore & O. R. Co. *v.* McIlyar (Ohio), 763.

Crossing signals, failure to give did not authorize verdict for plaintiff, whose cattle were struck by locomotive while trespassing near crossing. Miller *v.* Chicago, etc., Ry. Co. (S. Dak.), 32.

Evidence.

Trainmen's testimony that they did not see the animals, weight of. Miller *v.* Chicago, etc., Ry. Co. (S. Car.), 32.

Horse killed while trespassing upon railroad right of way in violation of ordinance, at point where company had no right to fence its track, liability of railroad. Gibson *v.* Iowa Cent. R. Co. (Iowa), 225.

In action for negligent killing of animal on railroad track, where the evidence is circumstantial, the circumstances shown must negative every other hypothesis except that of defendant's negligence. Gibson *v.* Iowa Cent. Ry. Co. (Iowa), 225.

Insufficiency of evidence to support verdict for plaintiff. Kennedy *v.* Chicago, B. & Q. Ry. Co. (Neb.), 497.

Mere killing of animal by collision with train is not evidence of negligence, nor can negligence be established by inference and conjecture in contradiction to good testimony. Kennedy *v.* Chicago, B. & Q. Ry. Co. (Neb.), 497.

STOCK, INJURIES TO.—Continued.

Presumption of Negligence.

Rebutted by evidence of good condition of engine and roadbed, and of competency of engineer and fireman, and that they did not see the animals. Miller *v.* Chicago, etc., Ry. Co. (S. Car.), 32.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; MASTER AND SERVANT.

Appliances.

Necessity of proving that certain appliances are in general use by street railways, rule not applicable to appliances the use of which is a matter of general knowledge. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

Street railway is only required to adopt methods, machinery, and appliances in accordance with ordinary usage of the business. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

Evidence.

Res ipsa loquitur, injury is within maxim of where it was caused by street car leaving track and striking wagon in which plaintiff was riding. Chicago Union Traction Co. *v.* Giese (Ill.), 195.

Mutual Rights.

Mutual rights and duties of street railways and other users of streets. Smith *v.* Connecticut Ry. & L. Co. (Conn.), 201.

Public's right to use part of street covered by tracks. Spiking *v.* Consolidated Ry. & P. Co. (Utah), 457.

Quo warranto, bill in nature of to test street railway's right to use street cannot be maintained by private individual. Thirteenth & Fifteenth Sts. Pass. Ry. Co. *v.* Broad Street Rapid Transit St. Ry. Co. (Pa.), 61.

TAXATION.

Certain statute of Wisconsin is not objectionable on the ground that it discriminates between members of a class, though it is applicable to railroads only, since for the purposes of taxation railroads constitute a separate class; and all railroads are treated alike. State *v.* Chicago & N. W. Ry. Co. (Wis.), 532.

Obligation imposed on railroads by Wis. Rev. St. 1898, §§ 1211, 1213, imposing on railroads annual license fees based on their gross earnings, is imposed by state under its taxing power. State *v.* Chicago & N. W. Ry. Co. (Wis.), 532.

TICKETS AND FARES.

Conditional roundtrip ticket, having the words "Charleston, S. C., and Return" written in ink across the printed matter, whether new contract made, or old one rendered ambiguous. Sellers *v.* Atlantic C. L. R. Co. (S. Car.) 306.

Evidence.

Parole evidence to explain ticket. Sellers *v.* Atlantic C. L. R. Co. (S. Car.), 306.

TRESPASSERS.

See LICENSEES.

Care due from trainmen to person walking along path on right of way. St. Louis S. W. Ry. Co. *v.* Bryant (Ark.), 504.

Care due person attempting to climb between cars of train which had not been obstructing the highway crossing for an unreasonable time. Southern Ry. Co. *v.* Clark (Ky.), 246.

Liability because of possibility of trainmen discovering trespasser's peril in time. Rader's Adm'x *v.* Louisville & N. R. Co. (Ky.), 528.

Lookouts.

Duty of trainmen. St. Louis S. W. Ry. Co. *v.* Bryant (Ark.), 504.

Signals.

Failure to give warning of train passing through town or city or approaching crossing will render railroad liable for injury caused thereby, even to a trespasser. Rader's Adm'x *v.* Louisville & N. R. Co. (Ky.), 528.

Speed of train, when negligent as to trespasser or licensee on railroad track. Rader's Adm'x *v.* Louisville & N. R. Co. (Ky.), 528.

TRIAL.

Judge's statement as to possibility of knowing ownership of engine supposed to have set the fire in question was not a charge on the facts. Stroud *v.* Columbia, etc., R. Co. (S. Car.), 28.

Misconduct of plaintiff, in personal injury case, in crying and trembling, etc., in view of jury. Connell *v.* Seattle, etc., Ry. Co. (Wash.), 701.

"Striking" employee of defendant street railway as juror, new trial should have been granted because of disqualification of. Gibney *v.* St. Louis Transit Co. (Mo.), 720.

USAGE.

See CUSTOM AND USAGE.

VENUE.

See RAILROADS.

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